

AMERICAN BAR ASSOCIATION

Central European and Eurasian Law Initiative

Domestic violence in Romania: the law, the court system

FINAL REPORT

– April 30, 2007 -



This report is made possible by the generous support of the American people through the United States Agency for International Development (USAID). The contents are the responsibility of ABA/CEELI, and do not necessarily reflect the views of USAID or the United States Government.

The statements and analysis contained herein are the work of the American Bar Association's Central European and Eurasian Law Initiative (CEELI) which is solely responsible for its content. The views expressed herein have not been approved by the House of Delegates or the Board of Governors of the American Bar Association and, accordingly, should not be construed as representing the policy of the American Bar Association. Furthermore, nothing contained in this report is to be considered rendering legal advice for specific cases, and readers are responsible for obtaining such advice from their own legal counsel.

AMERICAN BAR ASSOCIATION
CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE

Domestic violence in Romania: the law, the court system

“The breadth of domestic violence represents one of the most serious social problems that contemporary societies must face, Romania included.”

Cristina Nicoară, Deputy Chief Prosecutor
- Section on Research and Analysis -
Juveniles Prosecutor Office by the High Court

“The justice system culture does not understand that women, who were abused by their partners and ended up killing them, were victims as well as offenders.”¹

Dana Titian, Spokesperson
General Prosecutor’s Office

“The Romanian population is significantly more tolerant towards domestic violence in all its forms [than the average level in the EU].”

Roxana Teșiu, Executive President
Center for Equal Partnership (CPE)

¹ Reports estimate that, in Romania, half of women serving prison sentences for murder were victims of domestic violence and that many acted in self-defense.

Acknowledgement

Special thanks and credit go to the CEELI/Romania team who helped coordinate and guide the project, in particular Staff Attorneys Ana Maria Andronic, Iulia Răileanu (through March 2006), Ramona-Elena Cherciu, and Raluca Stăncescu who wrote the final report; Genoveva Bolea, Program Coordinator; and Adina Edu, Financial Manager.

We wish also to acknowledge the outstanding contributions of avocat Georgiana Fusu, a Working Group member who helped draft new legislative language and compiled the initial report draft; Professor Milena Tomescu, who contributed to the drafting of a new law; the special dedication of Judge Raluca Moroșanu, team leader of the eight seminars held during this project; and the dedication of Judge Sofia Luca and Judge Simona Franguloiu, as well as prosecutor Radu Moisescu who also served as seminars faculty. We wish also to thank Mr. Dragos Dumitru, Deputy Director of the National Institute of Magistrates, without whose support, the seminar for prosecutors would not have been possible.

Finally, this project would not have yielded such rich and important information without the insights and hard work of the CEELI working group - Aura Manuela Colang, President of the National Agency for Family Protection; Ștefan Crișu, Prosecutor at the Prosecutor's Office at the Bucharest Tribunal; Ionuț Durnescu and Aurelia Panait, inspectors at the Probation Department at the Ministry of Justice; Georgiana Fusu and Traian Marinescu, attorneys in Bucharest; Raluca Moroșanu, Judge at the Bucharest Court of Appeals; Rodica Niță, Vice-President of the Romanian Group for the Defense of Human Rights; and Mihaela Stoian, Judge at the First Instance Court in the 3rd District of Bucharest. The contribution of the 132 judges, 100 court clerk students and 16 prosecutors who participated in the six CEELI seminars on domestic violence was extremely important.

In addition, a virtual working group nationwide contributed to the present report. Special thanks go to its members: Iuliana Cărbunaru, Director of the Probation Department at the Ministry of Justice; Magdalena Ciupe, Probation Counselor at the Probation Service in Brașov; Aurel Dublea, Judge at the Iași Court of Appeals; Cătălin Luca, Executive Director of the Social Alternatives Association in Iași; Sofia Luca, Judge at the Iași First Instance Court; Tom Rawlings, Judge, Juvenile Court, Georgia, USA; Nicoleta Ștefăroi, Judge at the Iași Tribunal; Roxana Teșiu, Director of the Center for Equal Partnership; Viorica Țorțolea, Judge at the Timiș Tribunal; and Monica Varga, Prosecutor at the Prosecutor's Office at the Bucharest Court of Appeals.

Madeleine Crohn
ABA/CEELI Country Director
Romania

Table of Contents

INTRODUCTION	1
CHAPTER 1.....	5
PRELIMINARY CONSIDERATIONS ON THE CONCEPT OF DOMESTIC VIOLENCE	5
1.1. DEFINITION OF DOMESTIC VIOLENCE	5
1.2. DEFINITION OF VIOLENCE AGAINST WOMEN	6
1.3. TYPES OF DOMESTIC VIOLENCE	7
1.4. CONSEQUENCES AND EFFECTS OF DOMESTIC VIOLENCE	8
1.5. A FEW MYTHS REFERRING TO DOMESTIC VIOLENCE.....	9
CHAPTER 2.....	11
THE LEGAL FRAMEWORK ON DOMESTIC VIOLENCE	11
2.1. REGULATION OF DOMESTIC VIOLENCE IN ROMANIA	11
2.2. REGULATION OF DOMESTIC VIOLENCE IN THE LEGISLATION OF OTHER COUNTRIES	13
2.2.1. <i>The increasing impact of international documents</i>	13
2.2.2. <i>Criminalization of acts of domestic violence and protection measures for the victims in various national legislations</i>	14
CHAPTER 3.....	19
CONTROVERSIAL LEGAL ASPECTS	19
3.1. CRIMINAL LAW PROVISIONS ON DOMESTIC VIOLENCE	19
3.1.1. <i>Categories of offenses in the Penal Code</i>	19
3.1.2. <i>Specificity of Law no. 217/2003</i>	21
3.2. CRIMINAL PROCEDURES PROVISIONS ON DOMESTIC VIOLENCE	22
3.2.1. <i>The criminal procedure in case a preliminary complaint is required</i>	22
3.2.2. <i>The criminal procedure when a preliminary complaint is not required</i>	23
3.2.3. <i>Procedural provisions common to all means of notification</i>	23
3.3. SAFETY MEASURES THAT CAN BE TAKEN IN CASES OF DOMESTIC VIOLENCE	24
3.4. REFLECTIONS ON THE INTRODUCTION OF A RESTRAINING ORDER IN ROMANIAN LAW	26
CHAPTER 4.....	29
PRACTICAL ASPECTS.....	29
4.1. DOMESTIC VIOLENCE VICTIMS' ACCESS TO FREE LEGAL ASSISTANCE	29
4.1.1. <i>Legal assistance in criminal trials</i>	29
4.1.2. <i>Legal assistance in civil cases</i>	33
4.2. MEDIATION IN DOMESTIC VIOLENCE CASES	34
4.2.1. <i>General reflections on the use of mediation in domestic violence cases</i>	34
4.2.2. <i>The legal framework on mediation in Romania</i>	35
4.3. INSTITUTIONAL ASPECTS	36
4.3.1. <i>Specific prerogatives of the institutions involved in the area of preventing and fighting domestic violence</i> ...	36
4.3.2. <i>Inter-institutional coordination. Role of the National Agency for Family Protection</i>	42
CHAPTER 5.....	45
JURISPRUDENCE ON DOMESTIC VIOLENCE.....	45
5.1. RELEVANT JURISPRUDENCE ON CIVIL MATTERS IN ROMANIAN LAW.....	45
5.1.1. <i>Eviction of the perpetrator from the family residence</i>	45
5.1.2. <i>Temporary measures that can be ordered in cases of domestic violence</i>	46
5.1.3. <i>Separation of joint property in cases of divorce granted on the basis of domestic violence</i>	47
5.1.4. <i>Child custody and exercise of parental rights when one of the parents is the author of acts of family violence</i>	47
5.1.5. <i>Special protection of children against domestic violence</i>	48
5.2. RELEVANT JURISPRUDENCE IN CRIMINAL MATTERS IN ROMANIAN LAW.....	49
5.2.1. <i>General criminal law principles applicable to domestic violence cases</i>	49
5.2.2. <i>Situations in which a preliminary complaint is required</i>	54

5.3. PRINCIPLES IN THE CASE-LAW OF THE EUROPEAN COURT OF HUMAN RIGHTS THAT COULD BE RELEVANT TO DOMESTIC VIOLENCE CASES	55
5.3.1. <i>Positive obligations that Member States must comply with</i>	55
5.3.2. <i>Scope of the notion of 'family life'</i>	57
CONCLUSIONS	59
ANNEX I	63
ANNEX II	65
ANNEX III	67
ANNEX IV	69
ANNEX V	71
ANNEX VI	73
ANNEX VII	85
ANNEX VIII	87
ANNEX IX	95

Introduction

Public awareness of the dimension and severity of domestic violence in Romania is a recent development. Beginning in the late 1990's and early 2000's, organizations that provide services and assistance to victims of violence helped raise consciousness, conducted campaigns to inform the public, and advocated the adoption of a new law (Law no. 217/2003 – Law on the Prevention of Family Violence).

Beginning in 2003, the U.S. Agency for International Development (USAID) supported the development of a Coalition to combat domestic violence through several programs implemented by the John Snow International (JSI), the National Democratic Institute (NDI) and World Learning (WL). In 2005, as the network of support services and of shelters expanded, USAID asked the American Bar Association/Central European and Eurasian Law Initiative (ABA/CEELI) to examine how the justice system performed when domestic violence cases reached the courts. Specifically, USAID requested ABA/CEELI to:

- Document best practices within the existing legal framework
- Recommend how the legislation might be improved, and
- Test a pilot training module for judges, in collaboration with the National Institute of Magistrates (NIM)

Project partners included the Ministry of Labor (MOL), which oversees activities of the National Agency for Family Protection (NAFP); the National Coalition on Domestic Violence (NCDV); the Probation Department at the Ministry of Justice (MOJ); JSI; and individual judges, prosecutors, and attorneys who participated in various project activities.

Project activities took place in a fluid environment – particularly in the project's later stages – as some provisions of the code of criminal procedures were amended in the summer 2006. These amendments affected (albeit modestly) the processing of domestic violence cases. Also, by late 2006, the Romanian government (GOR) was entertaining the consolidation of the NAFP within the National Authority for Protection of Child's Rights (NAPCR), which has delayed action on the legislative amendment front (at this writing, final decision on the consolidation was still pending).

The purpose of the final report is to document project activities through early 2007, to inform: magistrates and the legal community about major concerns related to the implementation of the existing legal framework; Romanian institutions about necessary improvements if laws regulating domestic violence are to function properly and victims are to be protected adequately; and governmental and non-governmental service providers, as they begin to address the necessary upgrading of service delivery and mechanisms.

PROJECT DESCRIPTION

COMPONENT	DESCRIPTION	LOCATION	TIMELINE	DISCUSSION
<p>1. Working group including: 2 judges, 2 defense counsels, 1 prosecutor, representatives (1 each) of NAFP, NCDV, MOJ.</p> <p>Followed by review of Virtual Working Group (10)</p>	<p>The WG agreed to a discussion schedule, and methodology – WG members summarized discussions², and critiqued summaries in subsequent session.</p>	<p>ABA/CEELI offices in Bucharest</p>	<p>11 meetings over November 2005 – March 2006 period</p>	<p>WG members were instrumental in documenting why Law 217/2003 is generally not applied; and in identifying issues that formed the basis for seminar discussions.</p>
<p>2. Judicial Seminars <i>“Domestic Violence – theoretical and practical aspects”</i></p> <p>Faculty: Judge Raluca Moroşanu – Bucharest Court of Appeal</p> <p>Judge Sofia Luca – First Instance Court, Iaşi</p> <p>Judge Simona Franguloiu – Braşov Court of Appeal</p> <p>Prosecutor Radu Moisescu - Iaşi DIICOT Office</p>	<p>As part of the NIM continuous education – agenda included:</p> <ul style="list-style-type: none"> - presentation (myths); - discussion of 2 hypothetical cases covering controversial aspects of the law³; - 1 role play dealing with human aspects and hearing techniques (abuse of a minor). Attendees and trainers received NIM credits towards continuing education requirements, and professional performance. 	<p>Iasi</p> <p>Alba Iulia</p> <p>Timișoara</p> <p>Braşov</p> <p>Craiova</p> <p>Ploieşti</p> <p>Bucharest</p>	<p>In 2006</p> <p>June (3);</p> <p>November (2);</p> <p>December (1)</p> <p>April 2007 (2)</p>	<p>Attendees confirmed WG conclusions concerning the inadequacies of the legal framework; registered concerns about the timely and sufficient provision of social services; differed somewhat on a strict vs. more discretionary interpretation of legal provisions. Some favored amendments of the penal codes; others preferred maintaining a separate DV law and amending Law 217/2003.</p>
<p>3. Draft of new legislative language</p> <p>CEELI team: Pr. Milena Tomescu – Law school, University of Bucharest</p> <p>Georgiana Fusu, att.</p> <p>Ana-Maria Andronic, CEELI staff att. & former judge</p>	<p>CEELI consulted (April 26th, 2006) with the MOL, NAFP and NCDV, and offered to draft new legislative language (focused on the juridical aspects of the law) to replace law no.217/2003, or to amend provisions of the criminal codes.</p>	<p>N/A</p>	<p>The CEELI team circulated to the MOL, NAFP and NCDV a preliminary outline, a first draft and a final draft for comments (May-July), and submitted the document to the MOL on July 6th.</p>	<p>No action, in view of the pending changes to the lead institutions.</p>

² These summaries provided the base documentation for this report, as further informed by seminars.

³ The hypothetical cases were amended during summer 2006, in view of interim amendments to the Code of Criminal Procedures. The code is due for a thorough revision or rewrite in 2007, and this report will be provided to the Commission in charge.

Executive summary

This report summarizes the discussions of a Bucharest-based, multi-disciplinary working group (WG) of eight individuals (judges, prosecutors, attorneys, and representatives of Romanian institutions and NGOs connected to domestic violence issues).⁴

The group met eleven times over a five month period to analyze the legal framework governing domestic violence (DV) in Romania, drawing on comparative materials (such as the law in the U.S., in Bulgaria, and Council of Europe recommendations); the content and procedure of mediation; legal aid; operational questions concerning institutional responsibilities (governmental and civil society); and jurisprudence of the Romanian courts and of the European Court of Human Rights (ECHR). Summaries of the WG discussions were circulated to ten magistrates and legal professionals around Romania (Virtual Working Group - VWG), in order to obtain comments and compare perspectives. For the most part, the virtual group confirmed the Bucharest-based group findings.

The report also incorporates observations made by 132 judges, 100 court clerk students and 16 prosecutors during eight inter-active seminars held around Romania in June, November, and December 2006, as well as in April 2007, in Bucharest. Participants in these seminars discussed hypothetical cases covering principal ambiguities of the law and opined on how the law should be amended.

The chapters cover:

- Definitions of domestic violence and violence against women per various international instruments. In addition, the preliminary chapter addresses types and consequences of domestic violence as well as commonly held myths, to provide a context for the subsequent analysis and recommendations.
- A description of the Romanian legal framework and of regulations in other countries with particular attention to protection measures for victims.
- A point-by-point analysis of the controversial and ambiguous aspects of the Romanian DV related legal norms to demonstrate why existing legislation is defective. The chapter also includes options on how these problematic aspects could be remedied.
- A review of practical questions that surround the handling of domestic violence cases. This review includes the difficult access by victims to free legal assistance⁵ and related consequences for proper victim protection; important issues that must be addressed when mediation is offered as an alternate forum to resolve domestic disputes, particularly those involving recurring violence; and a discussion of some of the inadequacies of the current system of services provision.
- A summary of the Romanian jurisprudence on DV related criminal and civil cases (ranging from eviction of the abuser from the family residence, to temporary restraining measures, to general criminal law principles applicable to DV cases), and of ECHR jurisprudence. This last chapter is designed to serve as reference materials for Romanian judges and the legal community.

The report ends with a set of conclusions designed to inform the legislator, if or when the law on family protection is amended or rewritten (or portions thereof are incorporated in the Penal Codes) and to alert policy makers and stakeholders who will determine how to restructure and improve services for victims.

⁴ See Table at previous page – Project Description

⁵ Note: in several countries in the region, including Romania, “free” legal assistance is provided by court-appointed attorneys paid by the State.

Preliminary considerations on the concept of domestic violence

Domestic violence represents an extremely serious societal problem; one that some specialists even view as a form of torture⁶ due to its features and characteristics. Its social impact is widespread as it not only affects victims of domestic violence, but also persons witnessing or having knowledge of domestic violence situations.

Domestic violence is one of the most frequent forms of violence, and also one of the most alarming since it is often not sufficiently visible. In most cases, acts of violence take place behind closed doors and are concealed by victims due to both fear from their abusers and embarrassment towards society. Furthermore, the reticence of the government and its agencies to intervene in an area still considered 'private' is an obstacle.

In 2003, the Center for Equal Partnership⁷ conducted the first scientific research of this matter in Romania – the “National Study on Violence in the Family and at the Work Place.” The data collected raises alarming issues on the dimension of violence in the family and at the work place:

- (i) about 800,000 women asserted they were frequently subjected to family violence in various forms;
- (ii) over 340,000 children younger than 14 years old declared they frequently witnessed scenes of physical violence between their parents;
- (iii) over 370,000 children younger than 14 years old declared they have frequently witnessed incidents of verbal abuse between their parents or between adults in their household;
- (iv) compared to the data existing at the EU level, the population of Romania is significantly more tolerant towards family violence, in all its forms;
- (v) a higher tolerance, together with the use of clichés referring to violence, often result in viewing violent behavior as normal;
- (vi) violent behavior, when viewed as normal, is passed on from one generation to another.

1.1. Definition of domestic violence

Romanian Law **no. 217/2003 on the prevention of family violence** defines domestic violence as follows:

- (1) Domestic violence involves any physical or verbal act committed intentionally by a family member against another member of the same family that causes physical, psychological or sexual suffering or material damages.

⁶ Radika Coomaraswamy, special UN rapporteur on the issue of domestic violence against women between 1994 and 2003, 'Fight against Domestic Violence – Government Obligations', *6 Innocenti Digest* 10, 10 (2000).

⁷ Nongovernmental organization established in 2002 to promote equal partnership for men and women in public policies and practices (www.cpe.ro).

- (2) Moreover, preventing a woman to use her fundamental rights and freedoms is an act of domestic violence.
- (3) According to the definition of the Law, a family member includes the spouse, a close relative, as well as a person who established a relationship similar to that of spouses or parent and child, as documented by social services investigation.

According to the Council of Europe's documents, domestic violence is "any act or omission committed within a family by any of its members that prejudices the life, the physical or psychological integrity or the liberty of that family member and that seriously harms the development of his/her personality". (Recommendation No. R (85) 4 on violence in the family, Committee of Ministers, Council of Europe⁸)

According to two NGO's that conducted research on domestic violence in Romania, domestic violence is a behavior within the couple consisting of recurring physical, sexual and psychological attack of a partner, in order to control and dominate him/her, by using force and/or a victim's incapacity to defend him/herself. This also includes economic and social abuses. Acts of violence committed against a former wife or significant other are also included in the category of domestic violence.⁹

1.2. Definition of violence against women

According to the Platform for Action adopted at the 4th World Conference on Women Issues in 1995 in Beijing¹⁰, the term "violence against women" means "any act of gender-based violence that results in, or is likely to result in, physical, sexual or psychological harm or suffering to women". Acts of violence include threats of violence, coercion, or arbitrary deprivation of liberty, whether occurring in public or private life.

Accordingly, violence against women includes but is not limited to the following:

- (i) "Physical, sexual and psychological violence occurring in the family, including battering, sexual abuse of children in the household, dowry-related violence, marital rape, female genital mutilation and other traditional practices harmful to women, non-spousal violence, and violence related to exploitation;
- (ii) Physical, sexual and psychological violence occurring within the general community including rape, sexual abuse, sexual harassment and intimidation at work and educational institutions and elsewhere, trafficking in women, and forced prostitution;
- (iii) Physical, sexual, and psychological violence perpetrated or condoned by the State, wherever it occurs".

Violence against women is a demonstration of the power relationship between men and women, which results in women being dominated and discriminated by men, and in preventing their full development. Thus, this definition includes various forms of violence against women, and offers a framework for conceptualizing domestic violence.

⁸ Recommendation No. R (85) 4 on Domestic Violence of the Council of Europe was adopted on 26 March 1985 ([www.social.coe.int/en/cohesion/fampol/recomm/family/R\(85\)4.htm#FN1](http://www.social.coe.int/en/cohesion/fampol/recomm/family/R(85)4.htm#FN1)).

⁹ *Prevention and Efficient Intervention in Domestic Violence*, The Center for Legal Resources and the Institute of Research and Prevention of Crime, Bucharest 2003.

¹⁰ United Nations (Public Information Department) – Fourth World conference on Women Issues, Beijing, China 4-15 September 1995; Platform for Action and the Beijing Declaration 1996.

1.3. Types of domestic violence

Domestic violence may take various forms, more or less visible, such as physical, psychological, sexual, economic and social violence. Violence very rarely manifests itself through a single incident. Violent persons display a series of repetitive and aggressive behaviors which combine punishing and aggressive acts of several types. Domestic violence has particular features which make it different from other types of violence manifested incidentally or in different contexts, and involves a specific dynamic or cycle based on the type of relationship existing between the victim and the abuser. This is a serious phenomenon; a matter of community, social and public health interest, which affects mainly women. In fact, according to most reports, 95% of the total number of domestic violence victims are women.

As a behavior, domestic violence has:

- (i) *an instrumental* character (the abuser controls the victim and the behaviors become functional and persistent if the result is the expected one),
- (ii) *an intentional* character (it occurs with the intent to control, dominate and to maintain power. The intent is not acknowledged by the perpetrator but it can be identified by the results that such behavior produces), and
- (iii) *an acquired*¹¹ character (violence is not native but learned through imitation).

Physical violence¹² consists in painful physical contacts, including physical intimidation of a victim. Physical abuse is most often demonstrated through the following types of behaviors: slapping, kicking, hitting with the fist, jostling, clothes tearing, hair pulling, scratching, striking, mutilation, bruising, concussions, fractures, burns, battering, hitting the victim against walls or furniture, throwing objects, using knives and guns, immobilization, and tying up or detaining a victim and/or leaving a victim in a dangerous place. Physical violence also includes destruction of assets belonging to the victim or that the two partners own and use together.

In general, victims of physical violence in a family context are subject to different and numerous violent acts over time. The immediate effects of physical violence include bodily injuries, physical disabilities, and even death of the victim¹³. In time, victims of domestic violence develop permanent suffering, gastric-intestinal diseases, psycho-somatic affections, eating disorders, and post-traumatic stress.

Psychological Violence¹⁴ (includes emotional and verbal abuse) manifests itself in the form of: insults, criticism (referring to physical looks, intelligence, or the manner in which the victim performs her responsibilities in the family), threats, intimidation, emotional blackmail, inducing fear, continuous pressure, invoking terror, deprivation of food or sleep, and belittling in front of others. Psychological violence, which also qualifies as “emotional abuse”, is used to manipulate and control. Its effect is cumulative over time and it has serious long term consequences for the victim. Specialized literature indicates that this type of violence is a central factor for abuse within the family.

Sexual Violence/Sexual Abuse¹⁵ is defined by any sexual contact not desired by a partner or for which a partner did not express a valid consent. Unconsented sexual intercourse is rape. A general definition of rape is sexual relations that are obtained without consent by force, threat, and/or constraint. A spouse can be raped by her husband. The concept of spousal rape exists if relationships between partners are official. Examples of forced sex or sexual degradation include, but are not limited to:

¹¹ Of the adults who are violent with their partners, 60% grew up in families affected by domestic violence.

¹² G. Irimescu, *Social Assistance: Studies and Applications*, chapter on Domestic Violence and Intervention Methodology, Polirom Publishing House, Iași 2005.

¹³ Worldwide, between 40 and 70% of murdered women are victims of domestic violence.

¹⁴ *Information and Best Practices Guide in the Area of Equal Opportunities For Women and Men*, at 51, The Equality Partnership Center, 2004.

¹⁵ Family Violence Professional Education Taskforce, 1991.

- (i) continuing sexual activity when a victim is not fully conscious, does not give consent, or is afraid to say “no”;
- (ii) physical injury during a sexual contact or the injury of genitals, including by vaginal, oral, or anal use of objects or weapons;
- (iii) forcing a victim to have sexual relations without protection against pregnancy or sexually transmitted diseases;
- (iv) belittling the victim or invoking sexually degrading names.

Economic violence means a reduction of the victim’s resources and autonomy through control of his/her financial resources and access to money, personal items, food, transportation, telephone, and other forms of protection that he/she could benefit from. Economic violence is demonstrated through behaviors such as the abuser prohibiting the victim to get or keep a job, refusing to provide the victim with money for basic needs, and the lack of the victim’s involvement in decisions related to the administration of the family budget. A victim is kept in a state of dependency to the abuser.

Social violence is a form of passive psychological violence whereby the abuser controls the victim by isolating the victim from family or friends and/or monitoring the victim’s activities. The intended result is the interruption or erosion of social relations as well as limiting the victim’s access to information and assistance.

Specialists have identified a **cycle of domestic violence**:

- (i) *The phase during which tension grows* during which the victim acts cautiously and tries different strategies in order to avoid a violent incident.
- (ii) *The acute phase* during which the abuser takes action. This phase may last between 2 and 24 hours (sometimes even for a week or more).
- (iii) *The relaxation phase*, a calm period, during which the abuser shows gentleness and love towards the victim. This phase is just a vague truce in a war of threats and hitting.

These cycles evolve into a tighter spiral: the phases of tension become increasingly more frequent and last longer in time, violence becomes more and more threatening, and the gentleness phases become shorter or disappear completely.

1.4. Consequences and effects of domestic violence

Domestic violence has numerous negative and serious effects, both in the long and in the short terms. These effects have both direct (on the victim) and indirect (on persons witnessing violence acts) impacts.

Regarding the victim’s **physical health**, he/she may suffer bodily injuries, in various degrees of gravity that may often require medical care. Depending on the gravity of the injuries, the victims may suffer serious and lasting health disorders amounting to physical disabilities, total or partial loss of the ability to work, or even death. The **mental health** of the victim may also suffer as a result of the abuses. The victim is often afflicted with a series of transitory or permanent emotional disorders such as acute or permanent depression, anxiety, phobias, panic attacks, insomnias, nightmares, or post-traumatic syndrome (PTSD). In addition, depending on the duration and nature of the abuse, a victim may suffer from personality and behavioral disorders as well as eating disorders, and may attempt suicide. Addictive behaviors such as addiction to alcohol or tranquilizers may also surface.

A victim’s **professional and economic life** can be affected by the loss of or lack of employment due to the prohibitions imposed by his/her partner. Often the abuser will forbid the victim to get a job or, if the victim is employed, the abuser will often cause a scene at the victim’s workplace due to the

abuser's jealousy. In addition, it is not unusual for a victim to be absent from work or to need leaves of absence from work as a consequence of physical violence that requires medical care or which has left visible marks. Insufficient income or the lack of income will create financial dependency on the abuser, particularly in the absence of alternative resources. The situation is even more serious if a victim has minor children in his/her care. Victims who succeed in keeping their job face difficulties of focus and performance due to the abusers subjecting them to stress and harassment.

Socially, victims are gradually and, eventually, radically isolated from their families, friends, work colleagues, and social assistance services. A victim's social isolation represents one of the most severe factors for a victim's inability to successfully escape from such dependency.

1.5. A few myths referring to domestic violence

“Domestic violence is not so widespread or so serious”. Every year in Europe, 1 in 5 women and 1.8 million children are victims of domestic violence. Since all cases are not reported, the numbers are likely much higher. In Romania, there is no legal obligation to report such cases and, consequently, reliable statistics cannot be prepared.

“Hitting happens as a result of one losing his/her temper.” Physical aggression appears in a relationship in which an abuser already controls his/her partner through fear. Physical aggression is only one form of violence and is generally accompanied by other behaviors described above, such as intimidation, threat, psychological abuse, or isolation of the victim. Studies reveal that only 10% of domestic abusers show psychiatric disorders. The other 90% are able to exercise good judgment and can control their own reactions and behaviors.

“Domestic violence occurs only in poor communities and among the neducated.” With no exception, domestic violence occurs at all levels of socio-economic and cultural environments. Numerous cases of domestic violence have been registered among persons with university educations and high social status. It is possible that such prejudice starts from the idea that people with higher education and income can resolve a conflict situation more easily. In fact, victims coming from such environments report such aggressions more rarely due to embarrassment, social pressures or fear that their image will be affected negatively in their social or professional circles.

“The matter of domestic violence should be resolved within the family.” Without specialized assistance alternative methods to resolve conflicts within the family have, most often, an adverse effect¹⁶ by strengthening the abuser's position and increasing the victim's feeling of vulnerability.

“Victims accept aggression”. Victims accept or do not respond to a violent relationship because of fear. They believe that the danger is even higher if they leave their families and they become afraid for the safety of their children. Many abusers kill their victims when the victim finds the courage to leave them.

“If violence were so serious, a woman would break up the relationship with her partner”. Most of the time a woman does not find the strength to end a relationship after a first incident of abuse or aggression against her. The reasons for this are numerous: emotional and financial dependency towards the abuser, children and limited resources to raise them, low self-esteem and self-confidence, and lack of social and family support.

¹⁶ cf. chapter 4.2. on mediation.

“Consumption of alcohol is the cause of domestic violence.”

Alcohol is not a cause of domestic violence but a risk factor. Not all men who consume alcohol abuse their partners. Alcohol consumption does not justify the use of violence.

“Only women are victims of domestic violence”

Anyone may become a victim of domestic violence. Even though statistics reveal that most of the victims of domestic violence are women, a certain percentage of victims are men. Elderly people and children are two other extremely vulnerable categories.

The legal framework on domestic violence

2.1. Regulation of domestic violence in Romania

Domestic violence did not become a topic for public debate in Romania until 1995. The debate focused first on the issue of child abandonment, then on the reasons for abandonment, and finally on families facing social difficulties. By identifying these difficulties, the existence of the domestic violence phenomenon was acknowledged. At that time, the Romanian Penal Code did not consider domestic violence as a distinct offense. Thus, the possibility of intervention was reduced and intervention became dependent on how individual governmental institutions interpreted and applied these legal provisions.

- **The Constitution**

The Romanian Constitution guarantees equality of all citizens before the law and the public authorities, without any privileges or discriminations (Article 16), as well as the fundamental rights and freedoms of all individuals. The Constitution also establishes that no individual may be subjected to torture or to any other kind of degrading or inhuman punishment or treatment. Article 23 sets forth that individual freedom and safety are inviolable. The individual's right to legal defense in all cases is guaranteed by Article 24. Therefore, the constitutional acknowledgement of these rights implies that there exists the observance of women's rights and freedoms which protects them from being subjected to any acts of violence or degrading treatment that threaten their physical and psychological safety. Whenever any of these rights or freedoms is violated, women can and must benefit from the protection of the law.

- **Law no. 217/2003 on the prevention of family violence**

Law no. 217/2003 defines domestic violence as any physical or verbal act committed intentionally by a family member against another member of the same family that causes physical, psychological, or sexual suffering, or material damages. Domestic violence also includes preventing women from using their fundamental rights and freedoms. Thus, the Law expands the concept of domestic violence to include forms of violence other than physical ones. According to the definition of the Law (Articles 3 and 4), a "family member" is the spouse or a close relative, as defined by Article 149 of the Penal

Code, as well as a person who established a relationship similar to that of a spouse or parent and child as documented by the social services investigation.

Law no. 217/2003 establishes an obligation for the Ministries and other central specialized agencies to appoint staff specialized in handling domestic violence cases (Articles 5 and 6). The Law further requires collaboration between local authorities and non-governmental organizations in order to involve the entire local community in supporting activities to help fight and prevent domestic violence (Article 7).

The Law creates a governmental institution at a national level, the **National Agency for Family Protection**. This Agency has prerogatives to draft, implement, and apply a national strategy in the area of domestic violence. The Agency must also finance or co-finance specific programs in the area of protection and care of domestic violence victims (Article 9 § 1 c).

- **The Penal Code**

The Penal Code was amended by Law no. 197/2000 setting forth actions and sanctions for persons who perpetrate acts of violence against family members that cause physical and psychological suffering. In cases of the rape of a family member, the punishment established by law is harsher with the prison sentence ranging between 5 and 18 years.

- **Law no. 211/2004 on the protection of victims**

Law no. 211/2004 gives victims a right to information on their rights and provides for psychological counseling, free legal assistance, and financial compensations granted by the government. According to Article 8, victims of attempted murder, aggravated murder, or first degree murder, as well as victims of assault and battery or other violence causing bodily injuries, may receive psychological counseling provided by the Services for Victim Protection and Social Reintegration of Offenders.¹⁷ Under Article 14, victims may be granted free legal assistance, upon request. According to Article 21 § 1 a, victims of attempted murder, aggravated murder, first degree murder, assault and battery, or rape may receive financial compensations upon request.

- **Law no. 202/2002 on equal opportunities**

Law no. 202/2002 was the first Romanian law to establish the principle of equal opportunities for women and men. The Law was amended by governmental ordinance in 2004, when the National Agency for Equality of Chances for Women and Men was created. The Law sets the principle of equal pay for equal work and provides for concrete steps that employers must take in order to address complaints related to gender-based discrimination and the obligation for employers to inform employees of the content of the Law.

- **Law no. 272/2004 on the protection and promotion of children's rights**

Law no. 272/2004 outlines the legal framework on the observance, promotion, and guarantee of children's rights. Article 28 § 1 establishes the child's right to personal development and to protection against physical punishments or other humiliating or degrading treatments. Paragraph 2 of the same Article states that measures to discipline a child must respect the child's dignity and prohibits physical or other punishments harming the child's physical or emotional well-being. Any child has the right to file, by him/herself, complaints referring to the violation of his/her fundamental rights.

¹⁷ Now, the Probation Department at the Ministry of Justice.

Article 36 § 1 allows representatives of the Social Assistance Public Service or of the Social Assistance and Child Protection General Department to visit children at their residence and investigate how they are cared for with regards to their health and development when there are well-grounded reasons to suspect that a child's life and security are jeopardized within his/her family. Under Article 85 § 1, any child has the right to be protected against any form of violence, abuse, ill treatment, or negligence. According to paragraph 2 of the same Article, any natural person or legal entity, as well as a child him/herself, may notify the organizations authorized by law to take appropriate steps against any forms of violence. The reported violent offenses which could result in an authorized organization's action include: sexual violence, bodily injury, physical or mental abuse, ill treatment, exploitation, abandonment, or negligence.

- **Order no. 384/306/993/2004 on the approval of cooperative procedures in preventing and monitoring domestic violence cases**

This ministerial order regulates cooperation in preventing and monitoring domestic violence cases between the three ministries that have prerogatives in the area: the Ministry of Labor, Social Solidarity and Family (MLSSF), the Ministry of the Administration and the Interior, and the Ministry of Health. Article 2 of Annex 1 appoints the local institutions that must enter collaborative protocols to prevent and monitor domestic violence cases through their divisions that have prerogatives to address domestic violence and units charged with preventing and fighting domestic violence. The identified local institutions are: *jandarmeria*,¹⁸ the local departments for public health, and the local departments for family and social solidarity. These collaboration protocols set the activities to be carried out at a local level (Article 3).

2.2. Regulation of domestic violence in the legislation of other countries

2.2.1. The increasing impact of international documents

States' options in defining their policy on preventing domestic violence cases are no longer shaped exclusively by their national legal instruments since numerous programmatic documents have been adopted at the international level. The European states must take into account both the Recommendations of the Council of Europe and the work of the United Nations, particularly the Platform for Action approved by the 4th World Conference on Women Issues in 1995:

- (i) The Committee of Ministers of the **Council of Europe** adopted various recommendations to the member states: Recommendation No. R (79) 17 concerning the protection of children against ill-treatment; Recommendation No. R (85) 4 on violence in the family; Recommendation No. R (87) 21 on assistance to victims and the prevention of victimization; Recommendation No. R (90) 2 on social measures concerning violence within the family; Recommendation No. R (93) 2 on the medico-social aspects of child abuse; Recommendation No. R (2000) 11 on action against trafficking in human beings for the purpose of sexual exploitation; Recommendation No. R (2001) 16 on the protection of children against sexual exploitation; Recommendation No. R (2002) 5 on the protection of women against domestic violence. The purpose of these documents is to provide to the member states a unified definition of domestic violence. They also aim to identify at the European level the common denominator with regard to the applicable legal norms and procedures, both criminal and civil.
- (ii) Within the framework of the **United Nations**, during the World Conference on Human Rights that took place in 1993 in Vienna, participants agreed on the necessity to protect women in

¹⁸ Military law enforcement under the Ministry of the Administration and the Interior.

their families. The 1993 Declaration on the Elimination of Violence against Women, under all its forms, including spousal violence, sexual harassment at the work place, genital mutilation, and forced prostitution, contains a definition of violence that includes psychological violence as a form of domestic violence. In 1994, the Commission for Human Rights appointed a special *rapporteur* in the area of violence against women, whose mission is to collect comprehensive data and to propose recommendations at a national, regional and international level, in order to eliminate violence against women and its causes. Also in 1994, the International Conference on Population and Development in Cairo addressed the issue of equality between women and men with regard to their sex life and reproduction. The proposed action plans focused on stopping the trafficking of women and children, on promoting education of women as a measure of protection against domestic violence, and on establishing programs for victims of domestic violence. These questions were also addressed during the 4th World Conference on Women Issues held in Beijing in 1995. The Platform for Action adopted in Beijing states that violence against women is one of the 12 obstacles in guaranteeing women's rights as well as a violation of human rights. Special attention was paid to primary medical services for women who are victims of domestic violence and to strategies for the elimination of violence against women.

2.2.2. Criminalization of acts of domestic violence and protection measures for the victims in various national legislations

An analysis of various legislations in the area of domestic violence reveals that European countries have initiated legislative reforms in order to prevent domestic violence. Non-European countries followed the same trends. The analysis identifies two common points:

- (i) All acts of domestic violence are recognized as crimes and fall under the provisions of the penal law. However, only two European countries – Spain and Sweden – criminalize domestic violence acts as specific offenses, while in other countries such as the United Kingdom, Germany, Austria, Belgium, Bulgaria, and Turkey, a relationship between the victim and the abuser aggravates the offense. In France, such a relationship can be either an aggravating factor or an element of the offense.
- (ii) Victims are allowed to request measures of protection from the State. Such measures vary from financial assistance to the victim in Sweden, to restraining orders issued against the abuser in the UK and Austria. In Canada, the violation of a restraining order can be an aggravating circumstance.

Specific national examples are detailed as follows:

- **Spain**

In Spain, acts of domestic violence, if they occur repeatedly, constitute a specific offense, i.e. *tortures and other offenses against moral integrity*. According to the Spanish Penal Code, a person who subjects his or her partner or spouse to acts of physical or psychological violence may face prison sentences of 6 months to 3 years. Distinct and separate sentences for acts of violence, such as battering and the causing of physical injuries, can also be added. The Spanish judge can prohibit the abuser from coming close to the victim's domicile or from contacting the victim. Such a prohibition may not exceed 5 years and the judge can also deny the abuser access to the conjugal residence.

The Spanish Supreme Tribunal set a precedent in 1995, when it first recognized marital rape as a crime. In Spain, a preliminary complaint from the victim is not required in order to initiate criminal proceedings against the abuser. A judge may order measures for the protection of the victim and

designate who may occupy the family residence, but only if divorce or separation procedures have been initiated.

Victims are provided with financial assistance from the Spanish State if he or she was incapacitated for a period of over 6 months or if the victim does not benefit from social insurance. In the case of the victim's death, these financial rights are transferred to the direct victims of the violence, generally the children. Such aid is provided based only on a final decision delivered by the courts, and its amount is determined by the national minimum salary and the victim's financial situation. When the victim's financial situation requires it, he or she may be granted temporary financial assistance until the court's final decision. The State may ask for reimbursement of the temporary assistance if the court finds that no offense was committed or if the victim received damages. The Spanish Ministry of the Interior provides assistance through its specialized assistance offices. The largest police stations have specialized units for domestic violence cases. In larger cities, there are shelters for women who were abused and who left the conjugal residence.

- **Sweden**

In Sweden, the *violation of a woman's integrity* was recognized as a crime in 1998, and is defined as an offense against the life and the freedom or, as a sexual offense against a woman, with whom the abuser has or had an intimate relationship. The offender faces prison sentences of 6 months to 6 years and the sentence may be longer in the case of bodily injury. Marital rape is a specific offense.

Any person who has evidence that an act of domestic violence has occurred can file a complaint in order to initiate criminal proceedings, and a complaint filed by the victim is not mandatory. A restraining order against the abuser can be issued only if divorce proceedings are pending.

The Swedish State offers assistance to victims of domestic violence. Each police station may provide victims with an intervention squad in emergency cases and a bodyguard may be assigned to the victim. He or she may be offered an identity change. In 1994, the Swedish government set up a national center for ill-treated or raped women where they may receive emergency medical care and may benefit from social and legal counseling services, as well as police protection.

- **United Kingdom**

In the United Kingdom, marital violence is not a specific criminal offense. During trial, the judge may take into account the type of relationship between the victim and the abuser, and may grant compensation. Some domestic violence acts may be included, however, under *harassment*, which is a specific offense. Marital rape was defined as a distinct offense in the early 1990s, and sanctions vary depending on the length of the marriage. A complaint filed by the victim is not required in order to initiate criminal proceedings against the abuser.

British civil law allows the victim to request a restraining order against the abuser or an order regarding the family residence. Restraining orders may stipulate general or specific measures, such as prohibiting the abuser from contacting the victim by phone.

Legal provisions allow victims to request in court exclusive rights to the family residence. Such a decision is based on the parties' financial resources, on the parties' conduct, on the possible consequences for children, etc. This type of order is valid for 6 months, and may only be extended once if neither of the partners has property rights on the residence. If any of the partners has a property right on the residence, the court may include certain clauses such as payment of the rent to the owner or a maintenance and repairs obligation. Depending on the seriousness of the aggression and if the victim's security requires it, an abuser may be arrested even without issuance of an arrest warrant.

In the UK, victims of domestic violence also benefit from financial assistance. However, a victim benefits from such assistance only if criminal proceedings have been initiated against the abuser and the victim no longer lives with him/her. The amount of such assistance allows the victim to arrange for his/her housing or to select private health insurance coverage. As for the assistance provided to victims, specialized units have been created at police stations under the Ministry of the Interior. The Housing Law, enacted in 1997, establishes the obligation for local communities to provide accommodation for victims of domestic violence for up to a maximum of 2 years.

- **Austria**

In Austria, domestic violence is not the subject of specific legal provisions but is covered by the offense of assault and battery. Marital rape has been subject to criminal sanctions since 1989. Criminal proceedings may be initiated upon complaint of any person who has evidence that an act of domestic violence was committed. In the case of marital rape, criminal proceedings may be initiated once a criminal complaint is filed by the victim, unless serious injuries have incurred.

The Austrian legislation allows for the inclusion of the abuser in re-education programs. The Austrian judge may order the abuser to leave the family residence even if he/she is the owner. These legal provisions are also applicable when a victim was simply threatened with violence. The duration of restraining orders may not exceed 3 months. The courts may resort to law enforcement bodies so that such orders are enforced.

Law enforcement can act independently from the court decision immediately after an act of violence was committed. Since 1996, the law allows the police to deny an abuser the access to the victim's residence when he/she presents a danger to his/her life, health, or freedom. Such prohibition does not only refer to access to the victim's residence, but may also include the abuser's access to a certain area or clearly specified places (for example, the school building in which the children attend or to the victim's place of employment). The Austrian law allows law enforcement to immediately deny the abuser's access to the victim's residence in the case of violent acts that endanger the victim's health or freedom. Such a prohibition is valid for 10 days, but may be prolonged automatically if the victim requests a restraining order.

The obligation for law enforcement to assist by providing information regarding legal rights applies to both the victim and the abuser. It further requires law enforcement to report the case to the institution that provides free legal assistance. Also, non-stop special telephone lines are available for victims.

- **Portugal**

In Portugal, a law on the protection of victims of domestic violence was passed in 1991, and it includes provisions on financial assistance provided by the government. In 1999, Portugal adopted a national action plan against domestic violence which also provides for the creation of a network of shelters for victims, as well as for assistance to the victims.

The Portuguese Penal Code sanctions domestic violence and violence against minors. Marital rape is also recognized as a crime. Authors of acts of domestic violence may be sentenced to 1 to 10 years in prison depending on the seriousness of the aggression and, in case of the death of the victim, the sentence can be 3 to 10 years in prison. The abuser may also be forced to leave the family domicile.

Initiation of criminal proceedings must be preceded by a complaint filed by the victim. However, since 1998, criminal proceedings may be initiated even in the absence of such filing if it is in the victim's

interest and if he/she does not oppose prosecution. When divorce proceedings have not been initiated, the judge cannot order any protection measure for the victim.

The assistance provided by law to victims consists of financial support granted by the government when the victim is incapacitated for at least 30 days or if the victim's life was threatened and he/she did not obtain payment of compensations in court. Such financial support is intended to cover the damages endured. Victims' assistance includes access to shelters as well as legal representation in court provided by the associations for victims' protection.

- **Canada**

In Canada, some categories of violence, such as sexual aggression or sexual harassment, are offenses sanctioned by the Penal Code. However, in recent years, a new step has been taken which increases the maximum prison sentences from 5 to 10 years. Amendments to the Penal Code were adopted in order to facilitate the participation of victims and witnesses in criminal proceedings. The purpose of such measures was to ensure the protection of victims to a maximum extent. Provisions on harassment were strengthened by qualifying the violation of a restraining order as an aggravating circumstance. In addition, in some provinces, specific legislative measures provide for emergency orders to increase the victim's protection.

- **Latin American countries**

The example of **Latin America** is representative of countries with strong legislation in fighting domestic violence, but with limited impact on the matter. Latin American countries adopted extremely severe legislation on domestic violence against women. The movement of Latin American women fighting violence against women is one of the most advanced and active in the world. Latin American countries were among the first to ratify the Convention on the Elimination of All Forms of Discrimination against Women and to develop special legal instruments to eradicate violence. Their specific laws include psychological abuse as part of the legal definition of domestic violence which is an innovative component characteristic of modern approaches to domestic violence. However, Latin America remains a region with a high incidence of domestic violence cases. Statistics of the Mexican Foundation for Health show that 60% of the 6,000 cases of women who died in violent circumstances were under the age of 13 and most of them were victims of domestic violence. The foundation's studies also revealed that approximately 25,000 Mexican children have suffered psychological or physical abuses from their parents or relatives.

Controversial legal aspects

3.1. Criminal law provisions on domestic violence

The Romanian Penal Code does not define the concept of domestic violence. Although Special Law no. 217/2003 on family violence provides such a definition, it does not set a new category of offenses of domestic violence. Instead, Article 1 of Law no. 217/2003 lists the types of offenses in the Penal Code that could be considered as offenses related to family violence. With regard to these categories of offenses, the Law does not set specific procedures or sanctions and such offenses are to be handled according to the Penal Code and Criminal Procedures Code.

3.1.1. Categories of offenses in the Penal Code

Law no. 217/2003 sets a list of the offenses in the Penal Code that are incidents of family violence. The Penal Code classifies these offenses according to the specific social relationships that the Code protects:

- a) **offenses against life** that aim to protect a person's right to life:
 - aggravated murder (Article 175),
 - first degree murder (Article 176),
 - provoking or facilitating suicide (Article 179),
- b) **offenses against physical integrity and health** that aim to protect a person's right to physical integrity and health:
 - assault and battery (Article 180),
 - physical injury and serious physical injury (Articles 181 and 182),
 - assault and battery that cause the death of the victim (Article 183),
 - unintentional physical injury (Article 184),
- c) **offenses against individual freedom** that aim to protect a person's right to freedom (physical and moral freedom, freedom of action, inviolability of a person's domicile, freedom of correspondence, professional secrecy etc.):
 - illegal deprivation of liberty (Article 189),
 - slavery (Article 190),
 - forced or compulsory labor (Article 191),
 - threat (Article 193),

- blackmail (Article 194),
- d) **offenses related to sexual life** that aim to protect against sexual abuse, as well as other social relations (moral freedom, physical integrity or health etc.):
 - rape (Article 197),
 - sexual intercourse with a minor (Article 198),
 - sexual corruption (Article 202),
- e) **offenses against dignity** that aim to protect a person's dignity, both subjectively and objectively:
 - insult (Article 205),
 - slander/libel (Article 206),¹⁹
- f) **offenses against assets** that aim to protect property:
 - robbery (Article 211),
- g) **offenses against family** that aim to protect the relations within the family:
 - family abandonment (Article 305),
 - ill treatment applied to minors (Article 306),
 - non-compliance with decisions related to the custody of minors (Article 307),
- h) **offenses against public health** that aim to protect public health:
 - venereal contamination and HIV transmission (Article 309),
- i) **offenses related to assistance to those in danger** that aim to protect persons in danger:
 - exposure to danger of a person who is unable to take care of him/herself (Article 314),
 - non-assistance to a person in danger (Article 315),
 - non-assistance to a person in danger by failure to report such a situation (Article 316),
- j) **offenses that affect social relations** that aim to protect social relations, such as freedom of thought, inviolability of one's home, public order and morality and other relationships that are not expressly regulated in other chapters:
 - hindering freedom of religion (Article 318).

In addition to the list above, Article 1 § 2 of Law no. 217/2003 states that other offenses in the Penal Code could also be incidents of family violence, but does not provide examples of such offenses. The working group identified the following offenses on condition that there is a family relationship between the victim and the perpetrator:

- (i) breach of domicile (Article 192),
- (ii) violation of correspondence (Article 195),
- (iii) sexual perversity (Article 201),
- (iv) theft punished upon preliminary complaint filed by the victim (Article 210),
- (v) breach of trust (Article 213),
- (vi) destruction (Article 217),
- (vii) breach of possession (Article 220).²⁰

¹⁹ Articles 205 and 206 of the Penal Code were abrogated after the writing of the present document by Law no. 278/2006.

²⁰ Depending on the factual situation, other offenses in the Penal Code or other legal norms may be of relevance to cases of domestic violence. For example, the offense of trafficking in persons in Law no. 678/2001.

3.1.2. Specificity of Law no. 217/2003

According to Articles 3 and 4 of Law no. 217/2003, the specific element that defines a domestic violence offense is the **relationship between the victim and the perpetrator**. The Law refers to: “the spouse, close relatives or persons who established relationships similar to those between spouses or parent and child, as documented by a social services investigation.” Law no. 217/2003 refers to the definition of “*close relative*” in the Penal Code,²¹ but also expands its applicability to persons who established relationships similar to those between spouses or parent and child.

Consequently, the current laws set two distinct definitions of the notion of “*family members*”. Such co-existence of legal definitions was interpreted differently by the members of the working group. The majority opinion joined the current practice of most of the courts that give a strict interpretation of the Penal Code. A minority opinion favors a more flexible interpretation of the laws. These opinions are analyzed as follows:

When defining crimes, the Penal Code does not take into account the relationship between the victim and the perpetrator, except in Articles 180 and 181 that criminalize assault and battery and violence against *family members*, and set forth harsher sanctions. The definition of the concept of “family members” in the Penal Code is strict.²² In addition, even when the Penal Code allows the increase of penalties due to the familial relationship between the victim and the perpetrator (*i.e.* the *aggravating circumstances* under Article 75 § b of the Penal Code),²³ the interpretation is strict because of the definition of *family relationship* in the Penal Code.

Therefore, in practice, violence against family members continues to be sanctioned according to the Penal Code since the broader definition in Law no. 217/2003 is not enforced. The categories of persons who are considered victims of domestic violence, according to the Criminal Code, are lesser than those in Law no. 217/2003. Thus, according to the Penal Code, the following crimes are **not** considered acts of domestic violence:

- (i) offenses against a close relative that does not live in and does not contribute to the maintenance of the household together with the perpetrator;
- (ii) offenses against persons who established relationships similar to those between spouses or parent and child, as documented by the social service investigation.

A minority opinion interprets the legal norms of Law no. 217/2003 as special norms that extend the definition of “family member” in Article 149¹. Consequently, the definition of Articles 3 and 4 of Law no. 217/2003 is considered when applying the aggravating circumstance under Article 75 § b. Nonetheless, according to the current practice, when ascertaining offenses of family violence, most Romanian courts rely upon the Penal Code without mentioning any provision of Law no. 217/2003.

Thus, *de lege ferenda*, the definition of “family member” in Article 149¹ of the Penal Code should be amended in order to include close relatives that do not live in and do not contribute to the maintenance of the household together with the perpetrator, and persons who have established relationships similar to those between spouses or parent and child, as documented by the social service investigation.

²¹ According to Article 149 of the Penal Code, the notion of close relatives refers to “ascendants and descendants, brothers and sisters, children as well as persons who became such relatives by adoption according to the law.”

²² According to Article 149¹ of the Penal Code a “family member” is “the spouse or a close relative that lives and contributes to the maintenance of the household together with the perpetrator.”

²³ “Commission of a crime through acts of violence or cruelty against family members” is an aggravating circumstance.

3.2. Criminal procedures provisions on domestic violence²⁴

The Criminal Procedures Code (the “CPC”) contains no special provisions on how criminal investigations or trials are to be handled in cases of domestic violence. However, according to criminal procedures regulations, offenses related to domestic violence, as listed under Law no. 217/2003, can be divided into two categories depending *on the way in which the institutions authorized to conduct criminal investigations are notified*:²⁵

- (i) offenses for which a preliminary complaint must be filed by the injured party (Articles 180, 181, 193, 197 § 1, 205, 206, 305 and 307 of the Penal Code).
- (ii) offenses for which a preliminary complaint is not required (Articles 175, 176, 179, 182, 183, 189, 190, 191, 194, 197 §§ 2-3, 198, 202, 211, 306, 309, 314, 315, 316 and 318 of the Penal Code).

3.2.1. The criminal procedure in case a preliminary complaint is required

According to Article 279 § 2 of the CPC as amended by Law no. 356/2006, the injured party may notify by **preliminary criminal complaint** either the police or the prosecutor.²⁶ This provision is ambiguous since it does not set any limitations on the prerogatives of the police and those of prosecutors. As a result, a victim might be transferred from one institution to another since Romanian institutions need strict guidelines in order to operate.

As a general rule, the preliminary complaint is an instrument designed to protect the interests of the injured party. Article 131 § 1 of the Penal Code gives the injured party the right to file a preliminary complaint in case he/she was victim of certain categories of offenses. The right to file such a complaint has a personal character and belongs to the injured party. However, according to judicial practice and legal literature, a preliminary criminal complaint may also be filed by *an agent*, in which case the power of attorney must be specially drafted for this purpose and must remain attached to the complaint during proceedings. Article 283 of the Penal Code defines the contents of a preliminary criminal complaint that must include the following:

- (i) description of the alleged crime;
- (ii) alleged perpetrator;
- (iii) description of evidence;
- (iv) addresses of parties and witnesses;
- (v) claims for damages, if any;
- (vi) name of the civilly liable party, if applicable.

According to Article 283 of the CPC, a preliminary complaint must be filed within 2 months from the date when the injured party knew the identity of the perpetrator. When the injured party is a minor or a person without legal capacity, the 2 month term starts running from the date when the legal representative knew the identity of the perpetrator. Articles 284 § 2 of the CPC and 131 § 5 of the Penal Code determine who these legal representatives are. Also, when the victim lacks legal capacity or enjoys limited legal capacity, criminal proceedings may be initiated by the court *sua sponte*. Nevertheless, this provision has little practical impact and it is not clear how the court would become informed of offenses such as assault and battery when the victim is a minor. However, the court could, for example,

²⁴ The working group reached its conclusions before the Criminal Procedures Code was amended by Law no. 356/2006. This text takes into consideration the latest amendments.

²⁵ The CPC provides that, for certain offenses, only the victim can notify the institutions authorized to conduct criminal investigations by filing a **preliminary complaint** (Article 279). In other cases, any person may file a regular complaint if their interests were harmed in any way by the offense (Article 275).

²⁶ The older version of the CPC set three different categories of offenses for which the preliminary complaint had to be notified directly in court, to the police or the prosecutor, or to specialized criminal investigations divisions.

decide to continue criminal proceedings under Article 131 § 3 of the Penal Code when the legal representatives express their interest to withdraw the complaint if the court considers that it is in the interest of the minor or of the person lacking legal capacity.²⁷

The criminal action for offenses that require the filing of a preliminary complaint is governed by the principle of *availability* that allows the injured party to withdraw the complaint or to reconcile with the perpetrator, thus, putting an end to the criminal action. Since the court may bypass this principle when the injured party is a minor or a person lacking legal capacity, it can be argued that, when the injured party is of age and has withdrawn his/her complaint, the court could continue criminal proceedings because it believes this is in the injured party's interest.

3.2.2. The criminal procedure when a preliminary complaint is not required

For the other categories of offenses (for which the Law does not require preliminary criminal complaint) the criminal investigation institutions can be notified by a *complaint* or a *denunciation* or may act *sua sponte* when they come across information that an offense was perpetrated (Article 221 of the CPC). In all of these cases, the court is notified by the accusation act drafted by the public prosecutor.

According to Article 222 of the CPC, a **complaint** is a report filed by a natural person or a legal entity that is a victim of an offense. The complaint must include the following:

- (i) first name and family name;
- (ii) the plaintiff's address;
- (iii) description of the alleged crime;
- (iv) name of the perpetrator, if known;
- (v) description of evidence.

A complaint may be filed personally or through an agent. The power of attorney needs to be specially drafted for this purpose, and must remain attached to the complaint during criminal proceedings. A complaint filed verbally must be recorded in the register of the institution where it is filed. A complaint may also be filed by one of the spouses on behalf of the other or by a child of age on behalf of his/her parents, in which case the injured party has the right to refuse continuation of proceedings. If the victim is a person lacking legal capacity, the complaint must be filed by his/her legal representative. If the victim has limited legal capacity, he/she may file a complaint with the consent of his/her legal representative.

Article 223 of the CPC defines **denunciation** as a report filed by a natural person or a legal entity who has knowledge that an offense was perpetrated. A denunciation has to contain the same data as a complaint. If done in writing, a denunciation must be signed by the denouncer, and, in the case of a verbal denunciation, it must be recorded in the register of the institution where it was made.

3.2.3. Procedural provisions common to all means of notification

Regardless of the way in which they were notified about a domestic violence offense, judges, prosecutors, police officers, and agents must also comply with obligations under Article 4 of Law no. 211/2004 on the protection of victims. According to provisions of this Law, prosecutors, police officers, and agents²⁸ have the obligation to inform victims of offenses of the following:

²⁷ Under Law no. 272/2004, a child's interest prevails in all the decisions related to the child that were taken by public authorities or authorized private organizations, as well as in cases decided upon by the court.

²⁸ The judges were also concerned in cases of offenses for which a preliminary complaint was filed directly with the courts according to the previous version of the CPC.

- (i) services and organizations providing psychological counseling or any other form of assistance to victims, depending on their needs;
- (ii) the criminal investigation institution where they can file a complaint;
- (iii) their right to legal assistance and the institution they may address to obtain assistance;
- (iv) terms and procedures for receiving free legal assistance,
- (v) procedural rights of the injured party and of the party seeking compensations;
- (vi) terms and procedures to benefit from provisions of Articles 86¹, 86², 86⁴ and 86⁵ of the CPC,²⁹ as well as from provisions of Law no. 682/2002 on witness protection;
- (vii) terms and procedures for receiving financial compensations from the government.

Such information is to be provided to the victim by the prosecutor or the police officer or agent, in writing or verbally, and in a language that the victim understands. The respective judge, prosecutor, or law enforcement must record the observance of these legal obligations in a report.

Article 64 of the CPC lists the **types of evidence** admissible in court in cases of domestic violence offenses:

- (i) depositions of the defendant;
- (ii) depositions of the injured party, the civil party or the civilly liable party;
- (iii) witness testimonies;
- (iv) written documents, audio or video recordings, and pictures;
- (v) material evidence;
- (vi) technical-scientific findings;
- (vii) forensic findings;
- (viii) expertise.

Producing evidence in domestic violence cases can be difficult. Very often in practice, **witness testimonies** are more readily available. However, due to the particularities of such offenses, witnesses are, in most of the cases, family members, as defined by Article 149¹ of the Penal Code, or close relatives, as defined by Article 149 of the Penal Code. Relations between spouses, through their nature, are generally known best by their relatives and there often exists no other evidence outside the testimonies of the spouses' relatives. Such circumstances may create two problems in practice. First, such witnesses may invoke provisions of Article 80 of the CPC that allow them to refuse to testify. Second, if they do testify, the judge may disregard their testimony if there are well-grounded reasons to justify this court action.³⁰

3.3. Safety measures that can be taken in cases of domestic violence

The Penal Code, the CPC and the Law no. 217/2003 are applicable in this area. According to the Penal Code, the abuser may be subjected to compulsory medical treatment (Article 113) or hospital care (Article 114). The judge may also prohibit him/her from returning to the family residence for a limited duration (Article 118¹). Law no. 217/2003 refers also to these three safety measures.

The CPC regulates specific procedures³¹ in order to enforce safety measures under Articles 113 and 114 of the Penal Code at different stages of the criminal procedure such as during criminal investigations, during court trials, or once a conviction sentence is delivered. Nonetheless, enforcement of the measure under Article 118¹ raises a number of questions.

²⁹ Provisions allowing for the protection of personal data concerning the witnesses.

³⁰ A simple presumption of bias based on family relations is not sufficient in order to disregard such testimony.

³¹ The court orders such measures through a preliminary decision. One copy of this preliminary decision is handed to the parties and, if either party could not be reached, the preliminary decision is posted on the door of the domicile. This preliminary decision may be appealed separately within 3 days from delivery to the present parties or from communication in case any of the parties could not be reached. The appeal does not suspend enforcement.

According to the CPC,³² **during criminal investigations** the prosecutor may notify the court so that the appropriate safety measures are taken if he/she finds that the defendant is in any of the situations listed under Articles 113 and 114 of the Penal Code. **During trial**, the court may temporarily order the appropriate safety measure. The court may order any of the safety measures only after hearing from the defendant in the presence of the defense counsel and the prosecutor. The court oversees enforcement of temporary hospital care and also notifies the medical commission authorized to approve hospital care in cases of mentally ill persons and dangerous drug addicts. Temporary hospital care can only be lifted by court based on the approval of the medical commission. A court's decision confirming hospital care can be appealed separately. The appeal does not suspend enforcement.

Law no. 217/2003 regulates a **special procedure** that is slightly different from the one set in the CPC. It provides that during a criminal investigation or trial, the court, upon request from the victim or *sua sponte*, may temporarily order any of the measures listed under Articles 113 and 114 of the Penal Code. The court may also issue an order *prohibiting the abuser from returning to the family residence* any time there is sufficient evidence or probable cause that the abuser committed acts of violence that caused physical or psychological harm to another family member. Such measures terminate when the danger state that justifies them disappears.

Law no. 217/2003 raises a number of issues:

- (i) The Law does not specify what probable cause is. Thus, the courts need to refer to the definition of Article 68¹ of the CPC which stipulates that probable cause is when, according to data available in a case, one can assume that the person under criminal investigation is the one who committed the crime.
- (ii) The Law does not specify either, how the court is to be informed about the termination of the state of danger that led to a safety measures or, what conditions need to be assessed in order to decide whether such a state came to an end or not.
- (iii) If a request for ordering safety measures was filed during the criminal investigation stage, the procedure provided by the Law is in contradiction with Article 162 of the CPC:
 - Law no. 217/2003 specifies that the court can be notified of such a request by the victim or may act *sua sponte*, while the CPC provides that the court is to be notified by the prosecutor;
 - Law no. 217/2003 asks for sufficient evidence or probable cause that a family member committed acts of violence causing physical or psychological harm to another family member in order to issue such measures. The CPC, however, refers to the requirements listed under Articles 113 or 114 of the Penal Code (existence of a state of danger);
 - Law no. 217/2003 does not call for the hearing of the person against whom such measure is ordered, while the CPC does contain such a requirement;
 - Law no. 217/2003 does not specify how a measure ordered on a temporary basis is to be enforced, but the CPC provides details on enforcement of the orders in Article 435;
 - Law no. 217/2003 does not specify the procedure to be used in order to revoke any of the safety measures, while the CPC provides for such procedures in Article 437.

Consequently, in order to comply with all procedural guarantees with regard to the application of temporary safety measures as listed under Articles 113 and 114 of the Penal Code, the provisions of Law no 217/2003 have to be corroborated with the provisions of Article 162 of the Criminal

³² The Romanian criminal law makes a distinction between two notions: safety measures and preventive measures. Safety measures are designed to eliminate a state of danger to the public and to prevent crime in general, while preventive measures aim to ensure appropriate conditions for trial or prevent the defendant from escaping trial or serving the sentence. *cf.* Chapter 3.4.

Procedures Code. This corroboration should also include the interdiction to return to the family residence under Law no. 217/2003 (by analogy).

Separately, any of the safety measures listed under Articles 113 or 114 of the Penal Code may be ordered if a **conviction sentence is delivered** provided that the legal requirements are met. The Criminal Procedures Code provides specific procedures:

- (i) Articles 429-430 for compulsory medical treatment;
- (ii) Articles 432-433 for compulsory hospital care;
- (iii) Article 439¹ for the prohibition of the abuser from returning to the family residence for a limited duration.

The CPC provides for the substitution of compulsory medical treatment and hospital care (Articles 431 and 434) and the annulment of such measures (Article 437). However, **no similar procedure is described for the prohibition of the abuser from returning to the family residence for a limited duration**. Moreover, Article 439¹ refers very briefly to enforcement and the responsibilities of law enforcement or the legal instruments at their disposal are not clear.

3.4. Reflections on the introduction of a restraining order in Romanian law

According to most legal systems, a ‘protection’ or ‘restraining’ order is a temporary preventive measure designed to ensure one’s temporary protection from injury by prohibiting another person to approach him/her, his/her residence or work place, or to contact him/her in any way. Infringement of a restraining order is rigorously sanctioned. Such an order may become final or may be extended for a lengthier duration. In some countries, it may be ordered by civil, juveniles and family courts, while in others it is only of a criminal nature. Although it continues to generate controversy as to its practical effectiveness, there are opinions that consider restraining orders extremely useful for ensuring immediate protection for victims of domestic violence.

In Romania, the laws in force are insufficient to ensure in a speedy manner the proper protection of victims of domestic violence offenses. Application of any of the safety measures listed under Articles 113, 114 or 118¹ of the Penal Code may be ordered when a conviction sentence is delivered assuming all the legal requirements are met. The provisions of Law no. 217/2003 on ordering such measures during criminal investigations or a court trial are open to criticism due to their failure to observe the appropriate procedural requirements, as discussed above.³³ Their applicability is thus undermined. Consequently, the safety measures provided currently by the Romanian law are not designed to eliminate the immediate danger that victims of domestic violence may be confronted with.³⁴ Moreover, the law does not provide for preventive protection measures for this purpose since pretrial arrest and detention are subjected to restrictive conditions and inapplicable in most domestic violence cases. It is therefore obvious that the legislative framework needs improvement.³⁵

The discussion below, while not exhaustive, will cover some essential issues that must be addressed in order for restraining order language to be effective. These issues include: the nature of the restraining order, the person against whom and the conditions under which a restraining order may be issued, as well as specific criminal procedures. A draft proposal that aims to introduce the restraining order into the Romanian criminal law needs to contain sufficient substantive and procedural safeguards in order

³³ cf. chapter 3.3.

³⁴ The special protection measures that can be ordered in favor of the child under Law no. 272/2004 are not addressed in this report.

³⁵ Two draft proposals were issued in 2004 by the National Coalition of NGOs acting in the field of prevention of violence against women. These proposals aim to introduce the restraining order to the Romanian criminal law, and amend Law no. 217/2003 and the CPC accordingly.

to ensure its applicability by judges. Inadequate regulation of both substantive and procedural elements makes the restraining order impossible to enforce.

First of all, the **legal nature** of the restraining order must be clearly determined. The Romanian legislation sets two legal categories that could be relevant to restraining order: safety measures and preventive measures.

Safety measures may be ordered when all of the requirements listed below are met:

- (i) a perpetrator has committed a deed sanctioned by the criminal law;
- (ii) as a result of such a deed, a state of danger is created that suggests that future crimes are likely to take place;
- (iii) in order to put an end to such a state of danger, a criminal sanction is not sufficient and must be supplemented by safety measures (*i.e.* compulsory medical treatment or hospital care and/or interdiction to return to the family residence).

Safety measures are not a consequence of criminal liability and are not conditioned on the seriousness of the acts of the perpetrator. They may even be ordered in absence of a criminal conviction. Such measures can be ordered if it has been proven that there exists a state of danger and that the perpetrator might represent such a state of danger. As a rule, safety measures are ordered for an undetermined duration (as long as there is a state of danger) irrespective of whether or not a sanction has been applied to the perpetrator.

Preventive measures are criminal procedural measures of a constraining nature in which the defendant is prevented from carrying out certain activities that might have a negative impact on criminal proceedings. The general cumulative conditions for ordering preventive measures are the following:

- (i) existence of evidence or probable cause that an accused or defendant committed a deed sanctioned by the criminal law;
- (ii) the law establishes a prison sentence for such an offense;
- (iii) the defendant is in any of the situations listed under Article 148 of the CPC.³⁶

When selecting a specific preventive measure, complementary criteria specified in the final paragraph of Article 136 of the CPC needs to also be considered: the purpose of this measure, the degree of social threat of the offense, and the state of health, age, and criminal record of the person against whom such a measure is ordered.

The comparative analysis of the two categories of measures points out that the restraining order should be regarded, for both substantive and procedural reasons, as a safety measure.

³⁶ According to Article 148 of the CPC, pretrial detention may be ordered in any of the following situations:

- a) if the defendant has run away or has hidden, in order to avoid criminal investigations or trial, or if there is evidence that he/she will run away or escape in any way criminal investigations, trial or serving the sentence;
- a¹) if the defendant has, in bad faith, ignored the obligation not to leave the town or the country or any other additional obligation;
- b) if there is evidence that the defendant tries to prevent, directly or indirectly, finding the truth by influencing one of the parties, a witness or expert or by destroying, altering or concealing evidence;
- c) if there is evidence that the defendant plans on committing other crimes;
- d) if the defendant has intentionally committed other crimes;
- e) if there is evidence that the defendant is putting pressure on the victim or tries to reach a fraudulent agreement with the victim;
- f) if the defendant has committed a crime sanctioned by life imprisonment or by a prison sentence of more than 4 years, and there is evidence that he/she represents a danger for public order if he/she remains free.

Second, the categories of **persons against whom a restraining order may be issued** must be established. The Romanian criminal law operates a distinction between two notions: “*învinuitul*” (the “*accused*”) and “*inculpatul*” (the “*defendant*”).³⁷ Article 229 of the CPC defines the “*învinuit*” as a “person under criminal investigations . . . as long as the criminal action was not started.” Article 23 of the CPC defines the “*inculpat*” as a party in criminal proceedings against whom the criminal action was started. The distinction is relevant to this discussion since a safety measure may be ordered prior to court proceedings.³⁸

Third, any draft proposal on restraining orders must contain a precise legal definition of the conditions in which a restraining order may be issued. The language should **explain what the conditions for issuing a restraining order are**, as well as include a condition related to the legal sentence for such offenses. Since the purpose of such a measure is to limit the use of some fundamental rights (for instance, freedom of movement), it is imperative that the procedure observes the guarantees in the Constitution.

Finally, the legal procedures for the **issuing, revocation, termination and extension** of the restraining order need to be clear. Provisions need to be consistent with the CPC, and must provide the judge with sufficient legal instruments in order to protect the victims.

According to the working group, when introducing a new concept to the national criminal law, a careful evaluation of all substantive and procedural aspects of this institution is necessary. Law no. 217/2003 needs, therefore, to be amended rigorously in order to introduce the restraining order. This special Law must make available to judges all the instruments necessary in order to provide victims of domestic violence with real protection.

³⁷ For the present report, the general term “*defendant*” was used in both cases in order to facilitate reading. Where the distinction between the two notions was deemed necessary, the two terms were used as follows: “*accused*” for “*învinuit*”, and “*defendant*” for “*inculpat*”.

³⁸ *cf.* Chapter 3.3.

Practical aspects

4.1. Domestic violence victims' access to free legal assistance

Aside from generally lacking information about rights and legal procedures, the victim of domestic violence is often faced with the overwhelming obstacle of **considerable trial costs**. Therefore, access to legal/judicial assistance is essential.

4.1.1. Legal assistance in criminal trials

The Romanian law generally provides for the following **types**³⁹ of free legal aid in criminal cases:

- (i) Free legal aid granted by courts, criminal investigation bodies, or local public administration. This is also called *ex officio*⁴⁰ aid – a mandatory provision when the defendant cannot afford to retain counsel (article 171 § 4 CPC).
- (ii) Free legal aid granted by courts to the injured party, the civil party, or the civilly liable party, either *ex officio* or upon request, when the court deems that party cannot ensure him/herself legal representation (article 173 § 3 CPC).
- (iii) Free legal aid granted upon request to the injured party or to the civil party, provided that the party suffered from a grave offense or has a low income (article 14 of Law no. 211/2004 on the protection of victims).
- (iv) Free legal aid granted in exceptional cases by the Dean of the Bar upon request of a party, provided that the rights of the indigent party would be affected by the delay (article 68 of Law no. 51/1995 on the organization and practice of the legal profession).

Nonetheless, the relevant legal provisions overlap. Several norms are applicable in this area: the CPC, Law no. 211/2004 on the protection of the victims, Law no. 217/2003 on domestic violence, and Law no. 51/1995 on the organization and practice of the legal profession. These norms are analyzed as follows:

- **The Criminal Procedures Code**

According to the CPC, when the court believes that the injured party cannot prepare him/herself an appropriate defense, it may order, either upon request or *ex officio*, the appointment of a defense counsel. The disadvantages of such a regulation are that the injured party receives such assistance only

³⁹ The CPC refers to “legal assistance” or “*ex officio* assistance” rather than “judicial assistance”. All these phrases have the same meaning, i.e. legal assistance granted by a counsel appointed by the court in order to ensure the legal representation.

⁴⁰ In practice, “*ex officio*” is generally understood as being at the magistrates’ discretion.

during the trial phase, the appointment is left entirely at the judge's discretion, and there are no criteria to concretely frame this right. Consequently, in practice, such a measure is ordered **very rarely** in favor of an injured party⁴¹ although no specific obstacles preclude such an appointment in theory.

- **Law no. 211/2004 on the protection of the victims**

Article 18 of the Law sets the following requirements in order to grant free legal aid:

- (i) the injured party must be the victim of: an attempted homicide, murder in the second degree, murder in the first degree (Articles 174-176 of the Penal Code), a serious physical injury (Article 182 of the Penal Code), a deliberate offense which caused serious physical injury, rape, forced sexual intercourse with a minor, or sexual perversity (Articles 197, 198 and 201 §§ 2-5 of the Penal Code); or
- (ii) the victim's average income per family member is below the national minimum wage of the year when the victim filed a request for free legal aid.

The phrasing of the article seems to indicate that it refers to the legal assistance awarded during the court trial, and that it covers both criminal and civil actions.

The condition that the victim notifies the criminal investigation bodies or the court within 60 days from the date when the offense was committed is a restriction of this right. The Law thus sets a stricter system than the one in the CPC. Legal practitioners generally have a favorable view of such a restriction and consider it a component of the victim's fair diligence obligation. However, specialists who are familiar with the psychological impact of an abusive relationship are critical of it. In addition, domestic violence may be a recurring offense in which case the 60-day term should be calculated from the date in which the violence ceased to occur.

Contrary to the conditions set forth by the CPC, a request filed by a victim under Law no. 211/2004 benefits from a special status. A victim may state that he/she has already selected an attorney whose fees will be covered entirely or partially from special funds, yet, under the CPC, the defense counsel is appointed by the Bar. The special funds allow for double the national minimum wage, which is superior to the fees granted to defense counsels appointed by Bars under Article 173 of the CPC. The funds are granted from the state budget through the Ministry of Justice's budget. In addition, requests for free legal aid and free aid for enforcement of court decisions are exempted from court fees.

The Law sets the conditions⁴² under which such a request may be filed. It also provides that copies, supporting documents for the information provided, as well as any other documents that may be of use, must be attached to the request. However, practical application of these provisions shows that there is no clear list of such documents. This often results in inconsistent practices and even arbitrary denials of this right.

A request for free legal assistance is decided upon by a preliminary court decision delivered in chambers and by summoning the victim to appear. If the victim has not selected a defense counsel, the preliminary court decision approving the request for free legal aid must also appoint a defense counsel under Law no. 51/1995 on the organization and practice of the legal profession and the Statute of the legal profession. The preliminary court decision must be communicated to the victim. At the victim's request, a preliminary decision rejecting approval of free legal assistance may be reexamined within 15

⁴¹ Examples of situations where this provision is applied include cases where the injured party suffered from intellectual disabilities or a mental disease or the offense had a certain degree of seriousness such as rape or attempted murder.

⁴² According to Article 17 § 2 f of the Law, such a request must contain the victim's first and last name, the selected defense counsel, or the mention that the victim has not selected a defense counsel. The request must be filed with the tribunal under whose territorial jurisdiction the victim lives and shall be decided upon by two judges of the commission for granting financial compensations to victims of offenses, through a preliminary decision and within 15 days from the date when it was filed.

days from its communication by the Tribunal where the commission for granting financial compensations to victims of offenses sits. Within the CPC, however, such reexamination is not possible, and refusal to grant free legal aid is very difficult to appeal.

The above-mentioned provisions apply also to granting the aid necessary for enforcement of court decisions when civil compensation was awarded to the victim of an offense.

- **Law no. 217/2003 on the prevention of family violence**

The Law provides for legal counseling only for victims of domestic violence who have entered a shelter. Article 24 § 2 of the Law attempts to address two needs often met in practice: the financial needs, on the one hand, and a speedy intervention in order to avoid possible damages, on the other. The Law provides for free legal aid with the expenses being covered by the local budget following preliminary approval by the official in charge of approving the local expenses.

Article 24 of the Law requires that the victim be informed, while in a shelter, about the legal mechanisms through which he/she can protect the assets that were left behind with the abuser. These protective mechanisms include the abrogation of tacit disposition of joint assets upon notification by the bailiff or securing evidence through a court expertise. Legal advice is free of charge and the mayor may, in serious social cases and upon notification of representative of the social services, approve that the expenses incurred by the preparation of the legal documents be covered by the local budget. The victim may also have access to free legal assistance which can be reimbursed by the National Agency for Family Protection within specific programs. However, the **practical application of these provisions is yet to become sufficiently clear.**

The Law on domestic violence raises a number of issues related to legal aid:

- (i) The exact content of the legal aid provided to a victim is not clearly explained. For instance, whether legal aid is limited to providing information or whether it also covers drafting legal requests, and, if so, which.
- (ii) Article 24 § 2 creates a system which protects a victim's assets rather than the victim him/herself. Legal advice, however, should respond to all the problems of the victim relating to his/her violent relationship, whether they are criminal, civil, or administrative. The Law provides in its preamble that, when entering a shelter, a victim is informed of the legal devices he/she may use in order to protect his/her assets that were left behind with the abuser. It lists such devices in a restrictive manner rather than in an exhaustive one thereby rendering it useless and inapplicable in practice. Yet, the first concerns of a victim of family violence requesting legal advice are generally related to parental rights and personal safety. A victim's psychological state at this stage may sometimes be an obstacle to providing adequate legal advice. Regardless, through legal counseling, a victim can be informed of all possible options based on the information (even brief) he/she offers. Likewise, a victim should also be informed of the possible consequences of each legal procedure, including the costs.
- (iii) Also, it is important to note that approval by the mayor of financing legal aid is mandatory as the Law uses the phrase "*shall approve*", and not "*may approve*". This obligation is nonetheless limited to "*serious social cases*", and the Law does not list specific criteria in order to identify such cases. Furthermore, the Law does not regulate the procedure for reimbursement of such expenses.
- (iv) The Law does not explicitly define the principle of speedy intervention when dealing with victims of domestic violence, but this principle is implicit in the text. The Law refers to "*abrogation of tacit disposition of joint assets upon notification by the bailiff*" and to "*securing evidence*", but new and efficient legal instruments should be created instead of listing existing ones which are, to a great extent, useless.

- **Law no. 51/1995 on the organization and practice of the legal profession**

The provisions of this Law can be applied when the injured party requests legal assistance directly from the Bar association in the following circumstances:⁴³

- (i) if the rights of the indigent party would be affected by the delay;
- (ii) if the local Bar association finds that the party does not have the resources necessary to pay the fee.

The brevity of these provisions, which are not accompanied by any additional details or criteria, raises questions about their applicability. The statistics of Bar associations are structured in a manner that does not allow identification of the number of injured parties who were granted free legal aid.

In practice, the Law raises the following concerns:

- (i) The victims are generally unaware of their legal rights and, thus, do not make use of their right to free legal aid. Although the Law sets the obligation for the judiciary to inform victims of this right, in practice, this obligation is sometimes overlooked.
- (ii) Before the adoption of Law no. 211/2004 on the protection of victims, in absence of clear and consistently applicable criteria, the courts very rarely ordered the appointment of a defense counsel for the injured party. It is indeed the philosophy of the criminal trial that the right to action belongs to the government and is implemented by prosecutors, while the injured party has a reduced and passive role. It is only in a limited number of cases that prosecutors are authorized to support the civil rights of the injured party who lacks capacity of exercise or has a limited one. This is often the case even in the situation where there is an absence of a claim for damages. However, a recent study of the Ministry of Justice reveals that a civil action is very rarely initiated by the prosecutors or by the court *sua sponte*.
- (iii) The Law may create an inequality between the parties if the defendant⁴⁴ does not belong to a category for which free legal defense is mandatory and does not have the possibility to hire a defense counsel, but the victim belongs to a category which has the right to free legal aid. Such situations have not been reported in practice so far.

In conclusion, the legal framework in force aims to guarantee, quite exhaustively, the right to a defense for persons in vulnerable situations in which depriving the person of a defense would have disastrous consequences. However, the fact that the court is given complete discretion to assess a party's capacity to defend him/herself does not represent such a guarantee in the absence of clear criteria. In addition, the laws do not provide for remedies in cases where a person was refused the appointment of a defense counsel or failed to request one, and the right to the defense of a party was thus violated. Article 197 of the CPC contains the only way to sanction the failure to ensure mandatory assistance of a defendant by a defense counsel by rendering the decision null and void.⁴⁵ In other cases, nullity is relative and occurs only on the condition that irremediable damage was caused. Ambiguous and arbitrary criteria, the parties' lack of information, as well as the lack of legal remedies clearly undermine the guarantees of a victim's right to defense.

⁴³ Law no. 51/1995 does not make any distinction based on the criminal or civil nature of a case or on the position in a trial of the person requesting legal assistance.

⁴⁴ *cf.* footnote no 37.

⁴⁵ The Romanian law operates a distinction between two concepts: "*nulitatea absolută*" (absolute nullity) and "*nulitatea relativă*" (relative nullity). Absolute nullity is the sanction that renders void an act that disregards general norms that protect the general interest, while relative nullity is the sanction that renders void an act that disregards a legal norm that protects an individual interest.

4.1.2. Legal assistance in civil cases

The **Code of Civil Procedures** specifies that a person who does not have the resources to cover the costs incurred by a trial without endangering his/her own welfare or that of his/her family may request the court to approve judicial assistance. This requested assistance includes:

- (i) awarding exemptions, reductions, installments, or delays for the payment of court fees, stamp fees, and bails;⁴⁶
- (ii) free legal defense and aid by a defense counsel appointed by the Bar, and paid for by the state budget. Such a request may be addressed, under Article 74 of the Code, both to the court or directly to the Bar association. Recent amendments to the Code did not simplify or clarify the manner in which legal aid may be granted. Concurrently, similar provisions of Law no. 51/1995 on the legal profession are in force, and they establish other criteria for approval of judicial aid⁴⁷ but do not specify how the related costs will be covered.

In practice, the indigent party searching for damages in a civil court may face the following problems due to the ambiguous language of the Law and coexisting divergent regulations:

- (i) The language in both the Code of procedures and Law no. 51/1995 suggests that free legal aid may be awarded only during the actual trial phase. There are no provisions on awarding free legal assistance for pre-litigation legal services.
- (ii) There are no legal provisions in relation to additional expenses, such as costs related to witnesses, experts, or interpreters. The party cannot be exempted from paying such costs prior to the trial, and cannot recover them from the other party, even if such request was made in the claim.
- (iii) In civil cases, free legal aid cannot be granted by the court *sua sponte*. The party has to submit a written request that, according to Article 77 of the Code of Civil procedures, must list the subject and nature of the case for which assistance is requested and the requester's identity, address, and financial status. The party must also provide documents to certify his/her income and his/her financial obligations to other persons. The court analyzes the request and may ask for clarifications or evidence from the parties or for written information from the relevant institutions. If a party addresses such a request to the Bar association, Law no. 51/1995 does not specify how the request should be formulated, nor what documents should be attached to it. This is left to the Bar's discretion.
- (iv) There are no clear criteria in order to determine which parties qualify for legal aid. The Code states that a party must prove that he/she does not have the resources to cover the costs incurred by a trial without endangering his/her own welfare or that of his/her family. However, the Code does not give clear direction on how this danger to one's welfare or that of one's family must be assessed. In practice, such a situation is assessed only on strictly subjective criteria⁴⁸ and left to the judge's discretion. Therefore, such relief is rarely awarded in spite of the active role that judges should have during the trial according to Article 129 of the Code.
- (v) The Code does not allow for an appeal against a preliminary court decision rejecting a request for legal aid. However, Law no. 146/1997 on court fees sets forth that a request for reexamination may be filed with the court within 3 days.

⁴⁶ If a party benefited from exemptions or reductions, the costs may be imposed to the other party if this was requested in the claim. The court will decide on this aspect in the decision. Separately, fees of court appointed lawyers may be charged to the other party if this was requested in the claim.

⁴⁷ cf. Chapter 3.

⁴⁸ Such criteria vary from court to court, as well as the documents that the courts request as evidence. Yet, some such documents may require taxes in order to be issued (i.e. notary taxes), which are difficult to bear for an indigent party. Also, confusion remains between the legal aid granted by courts and that awarded by the Bar associations. Differences or advantages of either one are unclear, and the guarantees for the right to defense in civil cases are thus significantly reduced.

4.2. Mediation in domestic violence cases

4.2.1. General reflections on the use of mediation in domestic violence cases

The appropriateness of using mediation in domestic violence cases must be discussed. This analysis is based on data resulting from the application of such procedures in the American system, but it also reflects the debates on mediation in European States. It should be noted that, although mediation in domestic violence cases is mandatory in 32 U.S. jurisdictions, the debate on the appropriateness of using this procedure has lasted for over 30 years.

The definition of mediation calls for “parties, with the assistance of a neutral person, to analyze options and alternatives and reach an agreement, which reflects the needs of both parties. Mediation ... focuses on the participants’ responsibility in making some decisions which will affect their lives.”⁴⁹ Mediation therefore implies:

- (i) a balance in the parties’ capacity of negotiation, which would lead them to a viable and fair agreement;⁵⁰
- (ii) cooperation;⁵¹
- (iii) a valid consent given for the participation in mediation.

Arguments against the use of mediation in domestic violence cases refer to the fact that there is an imbalance of power between the victim and the abuser, particularly in cases of recurring violence. In addition, mediation implies the parties’ common will and openness to compromise in order to find the most appropriate solution, as well as their good faith. Further, a victim is, in most cases, incapable of articulating his/her own needs and may be exposed to new violence by the abuser. There is also a risk that the use of mediation as an alternative dispute resolution leads to the understanding that domestic violence is not a crime but a private family matter.

Conversely, there are also arguments in support of the use of the mediation procedure⁵² in domestic violence cases. In some cases, mediation represents the adequate intervention method, particularly, for example, in cases of occasional violence. Resorting to court procedures may result in an exacerbation of a conflict.⁵³ Unlike court procedures, mediation is a participative method for conflict resolution which may offer much more satisfactory and durable results from the point of view of the parties. The use of the mediation procedure may actually render the parties more responsible and encourage them to put an end to violence.⁵⁴

A general consensus seems to exist that the usefulness of mediation needs to be assessed on a case-by-case basis asking the basic question of whether it produces more benefits than disadvantages.⁵⁵ Mediation is not appropriate when the situation seriously affects values protected by law. Mediation standards must focus on a preliminary evaluation of the parties, according to strict criteria, and on creating guarantees which would prevent re-victimization and abuse of the procedure. Thorough

⁴⁹ Jay Folberg and Alison Taylor, *Mediation: A Comprehensive Guide to Resolving Conflicts Without Litigation*, 7-8 (1984).

⁵⁰ Laurel Wheeler, *Mandatory Family Mediation and Domestic Violence*, *Southern Illinois University Law Journal*, Spring 2002.

⁵¹ Barbara J. Hart, *Gentle Jeopardy: The Further Endangerment of Battered Women and Children in Custody Mediation*, *7 Mediation Quarterly*, Q317 at 317 (1990).

⁵² Rene L. Rimelspach, *Mediating family disputes in a world with domestic violence: how to devise a safe and effective court-connected mediation program*, *Ohio State Journal on Dispute Resolution*, 2001.

⁵³ This comment may be more appropriate in the common law system. A study conducted in Ontario by Desmond Ellis revealed that mediation contributed more to the reduction of the phenomenon than the agreements reached through lawyers. *Family Mediation Pilot Project Final Report*, Ministry of the Attorney General, Toronto, Ontario, July 1994.

⁵⁴ Holly Joyce, *The Culture of Battering and the Role of Mediation in Domestic Violence Cases*, 46 SMU L. REV. 2117 at 2169 (1993).

⁵⁵ Rene L. Rimelspach, *Mediating Family Disputes in a World with Domestic Violence: How to Devise a Safe and Effective Court-Connected Mediation Program*, *Ohio State Journal on Dispute Resolution*, 2001.

training of those in mediator positions is extremely important so that these professionals can acquire techniques specific to mediation in domestic violence cases. It is therefore essential to resort to this alternative dispute resolution procedure in domestic violence conflicts with great caution and professionalism, as well as to monitor mediation results in order to determine the real effects of such a procedure.

4.2.2. The legal framework on mediation in Romania

In its attempt to find an appropriate solution to domestic violence, Law no. 217/2003 on domestic violence introduces an alternative solution for conflict resolution: judicial procedures in court or alternative dispute resolution procedures, namely **mediation**. It was not until 2006 that relevant legislation on mediation was adopted with Law no. 192/2006⁵⁶ on mediation and the organization of the mediators' profession. The Law creates the legal framework that allows parties to resort, voluntarily, to this alternative procedure in civil, family law, commercial, and criminal cases, as well as in other legal areas. The definition given to mediation by the Law confirms its optional character in the resolution of disputes,⁵⁷ and, at the same time, establishes the basic principles of this procedure: neutrality, impartiality, and confidentiality. The special Law regulates the mediation procedure as an option for the parties in domestic violence cases. At the same time, the Law sets forth the obligation of persons in charge of handling such cases to provide guidance to the parties who are considering such an alternative.

The Law on mediation pays particular attention to the regulation of the mediation procedures, as well as to the way in which mediation is concluded. It sets forth three hypotheses in which mediation is concluded: the parties reach an agreement, the mediation fails, or one of the parties denounces the agreement to use mediation. However, the Law lacks clear provisions on the specific ways mediation should be conducted when it takes place prior to the criminal trial or after criminal investigations began. When mediation takes place after criminal proceedings have begun, the trial is suspended once an agreement to use mediation is presented by the parties. Suspension may last until completion of mediation, but no longer than 3 months after the mediation contract was signed. This last provision explicitly contradicts the provisions of Article 20 § 2 of Law no. 217/2003 which states that mediation does not stop the progress of a criminal trial.

In addition to the provision of the Law on mediation, Article 20 § 1 of Law no. 217/2003 on domestic violence refers to two distinct categories of mediators: the **family council** and **authorized mediators**.

- According to the Law, the family council consists of members of a family who have full capacity of exercise.⁵⁸ Yet, one should consider that the mediation procedure is extremely delicate, and generates many difficulties, both of practical and ethical nature. From this perspective, it appears highly risky to apply in practice the provision referring to mediation through a family council since most often members of the family council are not impartial. The relevant practice recommends the intervention of neutral specialists who are not members of the family. Careful selection and training of mediators is particularly necessary in cases of

⁵⁶ Published in the Official Journal no. 441 on 22 May 2006.

⁵⁷ **The framework decision of the Council of the European Union** of 15 March 2001, defines “mediation in criminal cases” as a way of resolving a conflict through negotiations between the victim and the perpetrator, which may take place prior to or during criminal proceedings, and through the mediation of a qualified person. In its Article 10, the framework decision establishes that each Member State shall make sure that any agreement between a victim and a perpetrator, obtained through mediation in criminal cases, shall be taken into consideration.

⁵⁸ Excepted family members are those who are serving a prison term, or those who would violate a prohibition to leave a locality, in order to participate in a family council. Trustees/guardians may also participate in a family council, when the family member they represent is involved. Meetings of the family council may be held upon proposal of any of its members or of the social services.

domestic violence. Intervention in such situations must be carefully considered and require the special training of professionals.

- Law no. 217/2003 does not contain any provisions referring to the category of authorized mediators. Therefore, the language of the Law is currently inapplicable and must be corroborated with the provisions of the Law on mediation.⁵⁹

All of the above arguments lead to the conclusion that the provisions of Law no. 217/2003 on mediation in domestic violence cases are insufficient, both from the substantive and procedural points of view. This leads to difficulties when implementing it. Adoption of framework regulations or supplementation of the special law provisions is possible options for consideration by the legislature, in order to make mediation efficient.

4.3. Institutional aspects

4.3.1. Specific prerogatives of the institutions involved in the area of preventing and fighting domestic violence

The institutional framework in the area of preventing and fighting domestic violence is a relatively complex one (*see chart previous page*), and it operates in two directions: preventing/combating acts of domestic violence and assisting victims/perpetrators. In practice, institutional efficiency is poor. This inefficiency is due mainly to a legal framework affected by a lack of correlation between various legal norms, and to deficiencies that still exist in the area of consolidating responsibilities of institutional actors. Finally, one must mention the obstacle represented by the mentality of some of those with responsibilities in the areas of prevention and intervention in domestic violence cases.

- **Central public institutions**

The **Ministry of Labor, Social Solidarity and Family**, as the lead agency responsible for coordinating this area, as well as the other **central public administration agencies** with prerogatives in the area of social protection and assistance (the National Agency for the Children's Rights Protection, the National Agency for Family Protection, the National Agency for Disabled Persons), have the main responsibilities for developing policies and promoting the social rights of all categories of vulnerable persons.

The creation of the **National Agency for Family Protection** was intended to be an important step for the Romanian government in assuming the responsibility to create an institutional framework which would foster the best solutions for preventing domestic violence, as well as for supporting the persons who are subjected to domestic violence. Prerogatives of the Agency are described in detail in the Governmental Decree no. 1624/2003 on the organization and operation of the National Agency for Family Protection. The Agency coordinates departments with prerogatives in fighting domestic violence at the level of each county and in Bucharest, and created within the local directions of the Ministry of Labor.⁶⁰

- **Local public institutions⁶¹**

The **local councils**, through their social services, are responsible for identifying and resolving the community social needs. They are in charge of creating and financing public centers for sheltering

⁵⁹ At the writing of the present document, regulations to set ethical standards and clear criteria for selecting cases appropriate for mediation, supervising the qualities of mediators practice, or for approval of the training standards were not yet developed.

⁶⁰In addition, the Ministry of Health, the Ministry of Education, Research and Youth, the Ministry of Administration and Interior, as well as other governmental institutions and bodies, develop social assistance policies and programs.

⁶¹ In municipalities ("*municipii*"), cities ("*orașe*"), communes ("*comune*") and the six districts ("*sectoare*") of Bucharest.

victims of domestic violence, recovery centers for victims, and assistance centers for abusers. Specialized personnel are to conduct *social investigations* for the purpose of analyzing the social and economic status of persons, families, groups, or communities, and have a role of social diagnosis. Practice shows that there is a demonstrated need for local councils to become more effective in their responsibilities by:

- (i) coordinating the creation, organization, and provision of services for preventing and fighting domestic violence depending on the identified social needs;
- (ii) drafting the annual budget for supporting social services in the area of preventing domestic violence according to the 2006-2007 local Action Plan on prevention and fight against domestic violence;
- (iii) ensuring payment of the approved subsidies to associations and foundations which conduct programs for fighting domestic violence.

In this context, the number of public shelters created under Law no. 217/2003 is presently extremely small.

The **general departments for social assistance and child protection** support the access of children and their families to services designed to keep children within their families and to protect them. The **social services** are responsible for the implementation of social assistance policies and strategies in the area of protection of children, families, elderly persons, and disabled persons, as well as of any person in need. **Local public services**⁶² have the role of identifying and resolving the community social problems, including those related to domestic violence, by:

- (i) financing or co-financing social assistance institutions;
- (ii) developing or diversifying, in partnership with NGOs, services in the area of domestic violence.

Also at the local level, **public health care establishments** have the obligation to enter into collaboration agreements with shelters for victims of domestic violence. The local **school inspections**, as well as the academic inspection in Bucharest, are to identify and flag the cases of abuse, negligence, ill treatments, or violence which affect school children:

- **Family assistants**

Law no. 217/2003 introduced a new professional category, the **family assistants**.⁶³ Family assistants have responsibilities in the area of domestic violence,⁶⁴ and are social assistants authorized by the National Agency for Family Protection to provide assistance specific to family relationships. The role of a family assistant is to defend the rights of persons affected by domestic violence and to promote and facilitate access to specialized protection and assistance services.

⁶² Local working groups were created by appointment in order to implement the National Strategy of Preventing and Fighting Domestic Violence. These groups are comprised of probation services together with other bodies in charge of implementing the strategy. They had not yet met at the writing of this document.

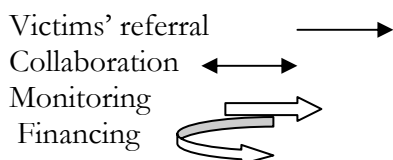
⁶³ Article 12 § 1 of Law no. 217/2003, amended by Article 12 of Governmental Decree no. 95/2003.

⁶⁴ Family assistants carry out their activities in institutions such as:

- (i) the National Agency for Family Protection;
- (ii) specialized departments within the local directions of the Ministry of Labor;
- (iii) social services;
- (iv) shelters;
- (v) general departments for social assistance and child protection;
- (vi) other units for preventing and fighting domestic violence such as centers for sheltering victims of domestic violence, recovery centers for victims of domestic violence, assistance centers for abusers, and centers which provide information and public awareness services in the area of domestic violence.

Inter - institutional relations and those with social actors involved in preventing and fighting domestic violence under the law

Legend:



MMSSF – the Ministry of Labor, Social Solidarity and Family

ANPF – the National Agency for Family Protection

MJ – the Ministry of Justice

MS – the Ministry of Health

ANPDC –the National Agency for the Protection of Children’s Rights

ANPH- the National Agency for Disabled Persons

MAI – the Ministry of Administration and Interior

ANES – the National Agency for Equal Opportunities to Women and Men

SPLAS – the Local Public Social Assistance Service

DGASPC – the General Department for Social Assistance and Child Protection

DMSSF – the Department of Labor, Social Solidarity and Family

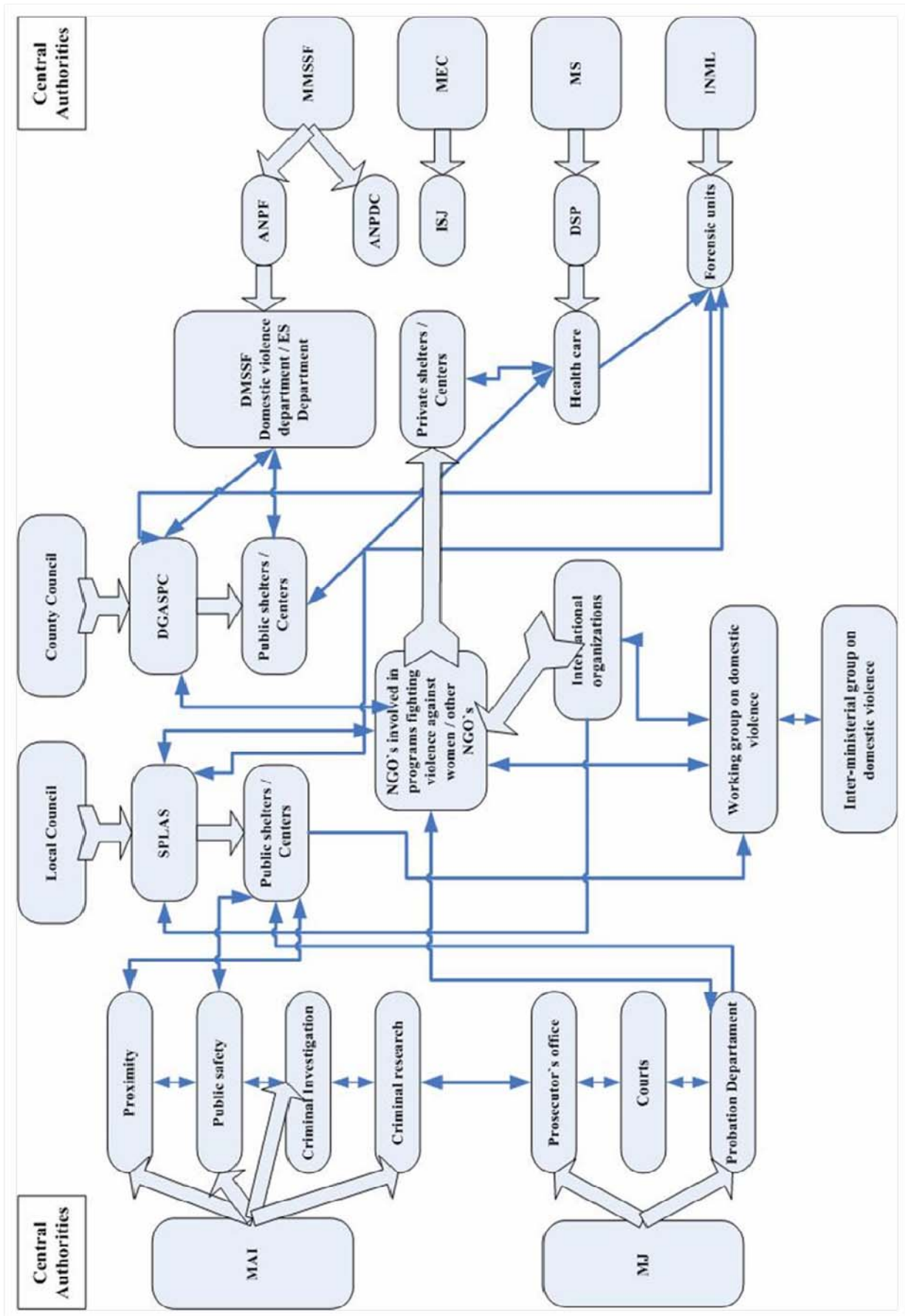
DSP – the Public Health Department

IȘJ – the Local School Inspection

INML – the „Mina Minovici” National Legal Medicine Institute

IML – the Legal Medicine Institute

SMLJ – the County Legal Medicine Service



In carrying out their responsibilities, family assistants have the following duties:

- (i) identifying and keeping a record of families in which conflicts occur that may cause violence;
- (ii) monitoring activities toward preventing domestic violence;
- (iii) identifying non-violent solutions by staying in contact with the persons in question;
- (iv) requesting support from natural persons or legal entities for the resolution of situations that generate domestic violence;
- (v) monitoring the observance of the rights of persons who resort to shelter services.

According to Article 14 of Law no. 217/2003, family assistants handle these cases as a team together with a person specially appointed by the Ministry of Interior. This stipulation exists, in practice, to apply one of the most ambitious desiderata of the Law – that of promoting multidisciplinary teams in handling domestic violence cases. *The inter-institutional collaboration methodology is not yet well established. Thus, at the moment,⁶⁵ the system is not operating at full capacity.*

Concerns have been raised that a professional who intervenes in domestic violence cases focuses more on his/her role or function than on multidisciplinary team work. It has also been noted that each institution tends to operate separately, sequentially, and with peripheral or bilateral, not multilateral, interactions. For example, practice indicates that there exists good, bilateral cooperation between a police officer and a prosecutor, limited collaboration between a prosecutor and a specialized physician – a unilateral circulation of the information – and a quasi inexistent collaboration between family doctors and providers of shelter-type services to victims of domestic violence or between social assistants and forensic specialists. *In these types of cases, such an approach may result in re-victimization, in addressing the issue in an incomplete and non-specific manner, in a low level of security for the victim, and in ignoring the needs of domestic violence victims.*

- **Law enforcement**

The **Romanian Police** monitors diverse and increased forms of violence within the family. This institution sets the guidelines in order to prevent, fight, and discourage crime in this area. Through its territorial units, the Romanian Police:

- (i) monitor existing family conflicts and identify and keep a record of the cases. Police intervention includes surveillance, warning, and, when required, sanctioning of the perpetrators;
- (ii) identify and keep a record of minors at risk, particularly of those who were victimized by their parents or close relatives, those who come from dysfunctional families, or those who have one or both parents who have criminal records and/or are alcoholics, mentally ill, and/or drug addicts or known for exhibiting violent behaviors;
- (iii) keep watch of persons with a criminal record and/or who are alcoholics, mentally ill, and/or drug addicted persons who have committed or about whom there is data that they do commit domestic violence acts. The police take specific required steps against these individuals;
- (iv) intervene through operative, well-grounded, and firm investigation of domestic violence cases, in cooperation with prosecutors' offices and courts. When the circumstances of the case require it, the police can initiate the procedures for preventive detention of the perpetrators or for their hospitalization. They can also initiate procedures for social protection and medical care of the victim.

⁶⁵ At the writing of the present document.

Currently, the Romanian police are under a continuous process of adjusting their specific activities to the communities' needs and of bringing them in line with normative and institutional dynamics. *The Crime Prevention Service and the Institute for Crime Research and Prevention* conducted a series of programs in the area of preventing domestic violence in partnership with governmental agencies and non-governmental organizations seeking to:

- (i) raise public awareness regarding the proportions and seriousness of this social issue. This was done through public awareness campaigns and community education programs which sought to change the general mentality and prejudices surrounding domestic violence by encouraging attitudes favorable to prevention and combating of this phenomenon;
- (ii) identify, record and monitor domestic violence cases;
- (iii) train police officers for an appropriate handling of complaints filed by victims of domestic violence;
- (iv) develop a common strategy, in order to ensure effective support to victims, which would involve all the institutions with which collaboration is necessary (prosecutors' offices, courts, non-governmental organizations, and medical care institutions);
- (v) initiate legal proposals, either by drafting new laws or by amending the ones in force.

- **Probation**

Laws no. 217/2003 and no. 211/2004 provide for extended responsibilities for **probation services** in order to conduct therapeutic and counseling programs for abusers (Article 6 § 2 of Law no. 217/2003), as well as to provide psychological counseling and other forms of assistance to victims of domestic violence. According to Law no. 211/2004, psychological counseling is free and may be provided for a period of up to 3 months. When the victims are minors, this period may be extended to a maximum of 6 months.

Article 6 § 2 of Law no. 217/2003 requires that the Service for Victim Protection and Social Reintegration of Offenders⁶⁶ train specialized personnel – social assistants and psychologists – in order for them to conduct therapy and counseling programs for abusers.

The two legal norms came into effect without containing or being accompanied by additional provisions which would allow for an effective application of the provisions described above. This flaw has not been remedied as of yet.

- **Public institutions to be created at the national level**

The Priority Action Plan for accession to the European Union calls for the creation in 2006 of the **Social Inspection**, under the coordination of the Ministry of Labor, Social Solidarity and Family.⁶⁷ It is designed to be an institution with the purpose of verifying standards in the provision of social services and payment of social assistance services. The inspection activity should cover all the public and private, national or local, institutions in charge of providing social services, and will be organized in decentralized departments, named *territorial social inspections*. *Tentative prerogatives of the Social Inspection are to:*

- (i) assess, on a regular basis, activities of social services providers at a national and local level;
- (ii) make recommendations and monitor their implementation;
- (iii) inform institutions, centers and services of the results of verifications;
- (iv) conduct specialized verifications for a specific evaluation of social policy aspects;

⁶⁶ The Service for Victim Protection and Social Reintegration of Defendants was renamed the “Probation Service” in May 2006.

⁶⁷ At the writing of this document, the Social Inspection was not yet created.

- (v) provide information on the management of social services to analyze and develop documents containing examples of best practices in the system, and to disseminate this information;
- (vi) publish national reports on the results of evaluations of social services, accompanied by proposals, suggestions, and recommendations;
- (vii) propose steps for increasing the quality of social services and improving the activity of institutions.

The Action Plan also calls for the creation of the *Social Observer* which will operate as a specialized institution under the direct coordination of the Ministry of Labor. The Social Observer is expected to develop a *database in the social area*, and provide information, studies, and evaluations at the request of public agencies and other institutions.

- **Nongovernmental organizations**

The *National Coalition of NGOs* involved in programs concerning violence against women is conducting extensive public awareness and information campaigns on domestic violence. The coalition is also lobbying and advocating to promote adequate legislation and legislative practices. At the same time, the coalition is offering direct support to victims of domestic violence by providing psychological counseling, legal advice, social assistance, and job intermediation services and through its educational programs.

4.3.2. Inter-institutional coordination. Role of the National Agency for Family Protection

The creation of the National Agency for Family Protection (ANPF) represented, for the Romanian government, a step towards assuming the responsibility for creating an institutional framework that would allow for the implementation of actions to prevent and fight domestic violence. The role of ANPF is to coordinate and integrate all efforts in order to fight and prevent domestic violence.

In order to promote efficient coordination, a Consultative Board was created within ANPF. It consists of a representative from each of the following ministries or agencies: the Ministry of Labor, Social Solidarity and Family; the Ministry of Health; the Ministry of Education, Research and Youth; the Ministry of Administration and Interior; the Ministry of Justice; the National Agency for Child Protection and Adoptions⁶⁸; and the National Agency for Disabled Persons. The Board's mission is to facilitate and increase the efficiency of the collaboration and communication between ANPF and other central and local public administration agencies.

ANPF signed collaboration protocols with other public institutions that have prerogatives in fighting domestic violence, as well as with relevant NGOs. Such a *collaboration protocol* was signed in March 2004 between ANPF and the National Coalition of NGOs involved in programs concerning violence against women. ANPF also collaborates with the universities in the country, with specialized nongovernmental organizations, and with the Institute for Crime Research and Prevention within the General Inspection of the Romanian Police.

The joint Order⁶⁹ no. 384/306/993 of July 12, 2004, of the Ministry of Labor, Social Solidarity and Family ("*Ministry of Labor*"), the Ministry of Administration and Interior, and the Ministry of Health, regulates the *collaboration process* between representatives appointed by these institutions and social

⁶⁸ The National Agency for Child Protection and Adoptions was reorganized in January 2005 in the National Authority for the Protection of Child's Rights and the Romanian Office for Adoptions according to Laws no. 274/2004 and 275/2004.

⁶⁹ Joint order approving the cooperation procedures in preventing and monitoring domestic violence cases.

assistants in preventing and monitoring domestic violence cases. The Order provides for the conclusion of *collaboration protocols*, in each county and in Bucharest, between:

- (i) the police;
- (ii) the *jandarmerie*;⁷⁰
- (iii) the public health departments;
- (iv) the local departments of the Ministry of Labor;
- (v) the departments for social assistance and child protection;
- (vi) the probation services;
- (vii) the academic inspections;
- (viii) the forensic services;
- (ix) the units for preventing and fighting domestic violence.

This was an attempt to create, at a local level, partnerships between representatives of public authorities and civil society, in order to collect information for the creation of a national database. It was also an attempt to identify methods of collaboration, as well as the resources available at a local level. *However, such protocols are not always put in practice through joint effective actions.*

Data on victims of domestic violence are provided by **departments for fighting domestic violence** within the local directions of the Ministry of Labor, and focus mainly on:

- (i) the number of beneficiaries, age, gender;
- (ii) their origin;
- (iii) education level;
- (iv) occupation;
- (v) income;
- (vi) civil status;
- (vii) number of children in their care;
- (viii) kinship relationship with the abuser;
- (ix) frequency and nature of aggression;
- (x) victim's death, if applicable.

In practice, there are difficulties in recording and reporting domestic violence cases, mainly due to the inconsistent methods in which partner institutions collect information about victims of domestic violence. This eventually affects the accuracy of statistics on domestic violence prepared and released by ANPF.

As a result, ANPF prepared, "*The National Map of Institutions Acting in the Area of Preventing and Fighting Domestic Violence*," on the basis of information collected nationwide and from the National Coalition of NGOs involved in programs regarding violence against women. *This national map demonstrates that, at a local level, there is an acute lack of social assistance services designed to prevent and fight domestic violence.*

The report further demonstrates that the collaboration between ANPF and the local authorities is not sufficiently consolidated because of a lack of firm involvement of local authorities in fighting domestic violence. There are no services in the community for preventing and monitoring risk situations, for the assistance and recovery of victims of domestic violence, or for surveillance and social reintegration. Legal intervention is slow and bureaucratic, and does not promote long-term protection and recovery of domestic violence victims. In rural areas, provision of such services, both public and private, is very poor. The frequency of problematic cases coming from such areas is an additional argument for the need to develop such services. Civil society initiatives devoted to preventing domestic violence, even though commendable, need to be further developed.

⁷⁰ cf. footnote no 18.

The importance of protecting victims of domestic violence, as well as the current structure of the system, requires both the involvement of representatives from all levels of government, and a good collaboration and communication among them. In order for the specialized directions to carry out their activities in proper conditions, there is a need at the local level for the other institutions involved (academic inspections, public health departments, police etc.) to be open and actively involved. Communication between the local directions of the Ministry of Labor and county councils is of extreme importance. Intervention of specialized services largely depends on the perception of family violence issues by the county councils.

Lately, there have been some encouraging trends in addressing the domestic violence issues. Very good collaboration was reported between the police and the general direction for assistance and child protection. However, *even though some institutions have been created, the system still has problems and needs numerous improvements.*

Similarly to the social protection system in general, the protection system for victims of domestic violence suffers from under-financing. The financing of institutions for social assistance and, even more, that of probation services is vulnerable in crisis situations and unclear with respect to which institution is responsible to cover the financing. However, as of 2006, the system was financed with funds from the state budget on the basis of National Interest Programs (NIPs). Through these programs, resources are granted for supporting specialized services through projects financed in partnership and intended for:

- (i) the development and the maintenance of units for preventing and fighting domestic violence,
- (ii) the development of probation services for family abusers.

This financing system based on NIPs offers an opportunity for progress to be achieved since funds are to be granted on the basis of the local needs.

Romania is presently undergoing a continuous transformation of the protection system for victims of domestic violence where the best solutions for reorganization and management are sought. The system is in continuous evolution in order to be based on realistic foundations and to comply with the European requirements in the area. Major changes need to be considered both at a legislative and at an institutional level. The system still does not have well-established mechanisms to offer real solutions. Consequently, many times such solutions are the result of improvisation and adjustment, rather than of a thorough and comprehensive decision-making process.

The current institutional system lacks a specific and consistent methodology. Its procedures do not always fit the victims' needs, and there is no real monitoring of domestic violence cases to verify whether the actions taken had any results. There is a need to design general standards and instruments that include relevant and useful information on how to handle domestic violence cases in a speedy manner. Collaboration is necessary between specialists and institutions that protect and support the recovery of victims of domestic violence. Collaboration encourages and allows for identifying good practices. Only then, multiple informational and technical resources will be available, and will increase the consistency in identifying the nature and the best solutions for domestic violence cases.

Jurisprudence on domestic violence⁷¹

5.1. Relevant jurisprudence on civil matters in Romanian law

As it was already noted above, domestic violence may take differing forms and includes acts of violence between spouses or concubines, between parents and children, or between close relatives. Legal norms criminalize such acts, because they affect social values and relationships protected by law, and require an official reaction of the government through its judicial authorities. However, the rights and obligations of the parties that fall under the civil norms should not be ignored and need to be protected, particularly since such rights and obligations can be used as means of pressure keeping a victim in a state of dependency towards the perpetrator or to counter reactions against the abusive behavior.⁷²

5.1.1. Eviction of the perpetrator from the family residence

Three situations are relevant to this analysis:

- (i) A rental contract entered into during the marriage gives equal rights of use of the domicile to the spouses, and an eviction action may not be initiated independently from a separation of the use of the residence. In such a situation, eviction of the *tolerated person*⁷³ may be approved upon request of the rent holder on the ground that cohabitation is impossible. As a temporary measure, the use of the domicile may be granted to one of the spouses. Eviction of a turbulent or violent person was confirmed in practice through extensive interpretation of Article 24 § b of Law 114/1996 on housing⁷⁴ and Article 2 of the Family Code.⁷⁵
- (ii) If the residence is the joint property of the victim and the perpetrator, judicial practice has found that eviction is possible through a provisional order, on condition that such measure is temporary, until the conclusion of separation of property. Requests for reintegration in the family residence filed by victims that were chased away from the family residence have been admitted through provisional orders, as well as those for eviction of the perpetrator for impossibility of cohabitation.

⁷¹ This chapter is a summary of a more extensive discussion in the Romanian version which is intended for the use of Romanian practitioners.

⁷² The UN Committee for the Elimination of Discrimination against Women decided, in the *A.T. v. Hungary* case (2003) that an effective protection against violence includes access of victims to civil right procedures, which would ensure separation from a perpetrator and protection of property and family life.

⁷³ A “tolerated person” is any person who does not have a right to the residence resulting from a contract, title, or law. The other spouse, who has not entered the rental contract, can be considered a *tolerated person*.

⁷⁴ “Rent can be terminated . . . upon request of the landlord . . . if the tenant’s behavior makes cohabitation impossible, and impedes normal use of the property.” Article 24 § b, Law 114/1996 on housing.

⁷⁵ “Family relations are based on mutual friendship and affection among family members, who have the duty to offer moral and material support to each other.” Article 2, Family Code.

If the victim owns the family residence, he/she may request eviction of the perpetrator either through emergency procedures (*i.e.* the provisional order) or through regular procedures.

It is important to note that **eviction of the perpetrator through a provisional order does not meet unanimity in practice**, despite the fact that the doctrine has offered numerous positive answers and solutions. Legal provisions on provisional orders are arguably fully applicable in the context of domestic violence since they refer to the defense of a right or to preventing an imminent danger that could not be repaired. In addition, emergency procedures are preferable because they are designed to ensure prompt protection to the victim.

In 2005, the Paşcani First Instance Court, through a provisional order, ordered the eviction of the abuser from a joint property apartment. The Court noted that the abuser exhibited violent behaviors and was violent toward his wife and minor daughter who shared the apartment with him. When intoxicated by alcohol, he repeatedly caused disturbances and hit his wife and daughter, who suffered from post-traumatic stress disorder. His wife and daughter stated that cohabitation was no longer possible, since the abuser had affected their health and kept them in a permanent state of terror. They further represented that they had no other place to live. The court agreed to the emergency procedures and found that the wife and daughter were forced by the abuser to leave the family residence and sleep in the park due to his repeated violence against them. In addition, the court relied on the necessity to provide the minor child with a normal and stable family environment.

5.1.2. Temporary measures that can be ordered in cases of domestic violence

Temporary measures may affect common property, the family residence, or the exercise of parental rights:

- (i) The Family Code provides for the separation (complete or partial) of joint property during the marriage if there are *well-grounded reasons* to justify it. Such a separation may not take place through an agreement between the spouses, but only through an action in court.⁷⁶ Since the Code does not define the concept of well-grounded reasons, the courts must consider such reasons very carefully depending on the specific circumstances of each case. The courts have granted separation of joint property if:
 - a. one spouse forces the other spouse, through ill-treatments, from the common residence preventing the other from using the residence for a long period of time,⁷⁷ or
 - b. one spouse does not contribute to the upbringing and education of the children.⁷⁸
- (ii) If the spouses own the family residence, the use of the residence may be awarded temporarily to one of the spouses. Such temporary use of the residence is generally granted if the evidence indicates that the presence of the perpetrator in the family residence would endanger the life or health of his wife or of their minor children.⁷⁹
- (iii) When parents disagree on the exercise of their parental rights, two situations must be considered: a) in cases of such disagreements between married parents, the judicial practice and the doctrine are unanimous that a department of the local authority⁸⁰ has the mandate to make a decision in the best interest of the child, after hearing from the parents; and b) in cases of a request for a divorce, the decision belongs to the courts who may also issue temporary measures, such as temporary custody granted to one of the parents.

⁷⁶ The Supreme Tribunal, Decision no. 1907/1972, RRD 11/1973 at 165.

⁷⁷ The Supreme Tribunal, Decision no. 1010/1972, RRD 5/1973 at 139.

⁷⁸ The Supreme Tribunal, Decision no. 798/1972, CD 1969-1975 at 27.

⁷⁹ The Supreme Tribunal, Civil Section, Decision no. 597/1988, RRD 1/1989 at 7.

⁸⁰ “*Autoritatea tutelară*” in Romanian – the department of the local council in charge with supervising whether parents comply with their parental responsibilities or whether legal guardians comply with their responsibilities towards incapable persons.

5.1.3. Separation of joint property in cases of divorce granted on the basis of domestic violence

Assets acquired under Article 30 of the Family Code are the joint property of the spouses and, when deciding on the separation of joint property in divorce cases, the courts must take into consideration such property as a whole, and not an individual's assets separately.⁸¹ As a general rule, assets are distributed according to the spouses' contribution to their acquisition. The wife's work in the household and her contribution to the education of the children is considered as an indirect contribution.⁸²

Separation of joint property in divorce cases focuses on the family residence. The Law provides that the common residence is exclusively awarded to one of the spouses when it cannot be shared:

In 1990, the Supreme Court of Justice decided that sharing the family residence cannot be accepted when cohabitation is impossible due to the inappropriate behavior of one of the spouses, especially when the couple has under-age children whose normal education and development would be jeopardized by such a situation.⁸³

The Law does not set specific criteria for awarding the residence to either of the spouses. When there are under-age children in a marriage, the courts consider first the best interest of the children and generally award the residence to the spouse to whom the children were entrusted. If there are no children, the courts commonly rely on objective criteria: the state of health and revenues of each spouse, the prospects of each spouse acquiring a new property or of living with family or other persons, effective use of the property by one of the spouses, and the ability of each spouse to pay the difference in value of the property.⁸⁴

Violent and aggressive behavior may also be considered as a criterion when awarding use of the residence. While the courts decided that the benefit of the rent contract was to be awarded to the wife who had been the victim of domestic violence and had been chased from the family residence,⁸⁵ separation of joint property cannot rely on a single criterion and the real interest of each spouse in being awarded the joint property must be examined.

5.1.4. Child custody and exercise of parental rights when one of the parents is the author of acts of family violence

The effects of intra-family violence on children are not always considered by the Romanian courts. In general, they appear to presume that children are not seriously affected by the acts of violence of one parent against the other, except for the situations where they are directly involved.

It is already established that the alteration of a family relationship and the tensions resulting from it are generally detrimental to children and have devastating effects on very young children. Reports⁸⁶ underline the extent to which children are affected by the violence they witness and reveal that, for young children, threats against the person who raises them have more serious effects on their psychological well-being than do attacks against themselves.

⁸¹ The Supreme Court of Justice, Civil Section, Decision no. 907/1993, *Dreptul* no 7/1994 at 80.

⁸² The Supreme Tribunal, Decision no. 325/1982, Jurisprudence Record of the Supreme Tribunal 1980-1985 at 15.

⁸³ The Supreme Court of Justice, Civil Section, Decision no. 220/1990, *Dreptul* no. 1/1991 at 69.

⁸⁴ The Supreme Court of Justice, civil section, Decision no. 2726/1991, *Dreptul* no. 7/1992 at 75; *cf.* The Supreme Tribunal, Civil Section, Decision no. 938/1980, CD 1980 at 112.

⁸⁵ The Supreme Court of Justice, Civil Section, Decision no. 2323/1993, *Dreptul* no. 8/1994 at 83.

⁸⁶ C. Sturge and D. Glaser, *Personal Connections with an Under Age Child and Domestic Violence – an Expertise Report for the Use of Courts*, US Family Law, September 2000 at 615-29.

When deciding a custody case, courts must always consider the child's best interest. In practice, courts define this general principle according to various criteria: the child's age; the material conditions a parent can provide in order to guarantee a proper moral, intellectual, and physical development; the parents' affection for the child; the child's affection for the parents; the parents' profession; the parents' social and moral profile; their state of health, interest, and care shown during the marriage as well as after their *de facto* separation; and the ability of each parent to take care and look after the child.⁸⁷

In addition, if the child has reached the age of 10, Romanian law allows for him/her to express a preference regarding custody.⁸⁸ When analyzing the opinion expressed by the child in chambers, courts must consider his/her psychological development, as well as the possibility of his/her being influenced by members of the family. Therefore, a child's opinion cannot be a decisive factor in awarding the custody. That which is in the best interest of the child based on the above mentioned criteria is what must prevail.⁸⁹

In this context, a history of family violence is a criterion to be considered when deciding a custody case. The risk that the trauma is perpetuated through emotional abuse against the child is important. Courts must consider several aspects⁹⁰ including the frequency and the nature of the acts of violence, effects on the parent who was the victim of the acts of violence, the effects of the domestic violence on the child, and the abuser's willingness to acknowledge his/her behavior and to amend it.

A parent's refusal to comply with a court decision on child custody and unlawfully withholding the child for a long period of time cannot justify re-awarding the custody to this parent. In 1991, the Bucharest Tribunal decided that:

It is inadmissible to decide in favor of the parent who does not comply with a final court decision, and to accept the argument that the child stayed with this parent for a longer time.⁹¹

The same reasoning should apply when a parent was forced to leave the family residence as a result of acts of violence and the child was left with the violent parent during custody procedures.

5.1.5. Special protection of children against domestic violence

Law no. 272/2004 on children's rights establishes a special procedure designed to offer protection to children who are victims of abuse, neglect, or exploitation. If the social workers find out that there are well-grounded reasons that support the existence of an imminent danger for a child due to abuse or neglect, the local department for social assistance and child protection notifies the courts who may then issue a provisional order to immediately place the child with a person, family, maternal assistant, or residential-type service, as authorized under the Law. Within 48 hours after the enforcement date of the provisional order for immediate placement, the local department for social assistance and child protection may notify the courts to decide whether:

- (i) to replace immediate placement with permanent placement;
- (ii) to withdraw parental rights entirely or partially from a parent or both parents;
- (iii) to settle on the exercise of parental rights.

⁸⁷ The Supreme Tribunal, Civil Section, Decision no. 430/1985, RRD 12/1985 at 69.

⁸⁸ Law no. 18/1991 on the ratification of the UN Convention on Child's Rights and Law no. 272/2004 on children's rights, allow for the hearing from children even if they did not reach the age of 10, depending on their maturity and level of understanding.

⁸⁹ The Supreme Tribunal, Civil section, Decision no. 325/1986, RRD 11/1986 at 64.

⁹⁰ Dame Elisabeth Butler-Sloss, President of the High Court's Family Section, Great Britain, speech on 8 September 2003.

⁹¹ The Bucharest Tribunal, Decision no. 1220/1991, CD 1991 at 34.

When deciding on the permanent placement and withdrawal of parental rights, courts may ask for the child's deposition on the abuse or neglect to which he/she was subjected. A child's deposition may be recorded by audio-video devices and in the presence of a psychologist. If the court deems it necessary, it can hear from the child directly in chambers and in the presence of a psychologist, but only after a preliminary preparation of the child.

These legal provisions are commendable because they adjust judicial procedures in view of the psychological characteristics of a child who is a victim of domestic violence/abuse. The Law asks for the presence of a psychologist during the hearing and provides for the use of technical devices for producing evidence. Unfortunately, its applicability is limited only to the special protection measures under Law no. 272/2004:

In 2005, the Tribunal for Juveniles and Family in Braşov ordered permanent placement of a child in a placement center, withdrew parental rights from the child's parents, and transferred parental rights to the chief of the placement center. The Tribunal had been notified of such a request by the local department for social assistance and child protection, stating that the child was neglected by her parents, that her father was violent, and that her physical, mental, spiritual, moral development and safety were in serious danger.

The Tribunal issued first a provisional order to refer the child immediately in the placement center, and the Tribunal's decision was enforced by the police. The Court took into account the fact that the child was in physical danger, living in improper conditions and without any medical supervision. According to the psychologist's report, she was also in psychological danger due to the violence and emotional abuse she witnessed. When she was taken by the police, she showed signs of neglect, inadequate nutrition and lack of vitamins.

When deciding upon permanent placement, the Tribunal heard the child in chambers. She confirmed that she was subjected to physical and psychological abuse. She told the Court that her mother had hit her several times, and threatened her with a knife. She also witnessed scenes of violence between her parents who were frequently intoxicated. In spite of the fact that she was stabbed with a knife, in the presence of her daughter, the mother refused to submit a criminal complaint against the child's father.

Considering all the above, and based on the provisions of Law no. 272/2004, the Tribunal decided that it was in the child's best interest that she remains in the placement center where she benefits from comprehensive individual protection. The Tribunal withdrew parental rights from the child's parents, and transferred these rights to the chief of the placement center for the duration of the placement.

5.2. Relevant jurisprudence in criminal matters in Romanian law

5.2.1. General criminal law principles applicable to domestic violence cases

The number of cases of domestic violence reported by the Romanian courts is relatively small.⁹² This can be partially explained by the different criteria⁹³ used to classify a case as a domestic violence case. The highest percentage of cases involves violence between spouses or ex-spouses, and the wife is the victim and the husband is the abuser. Cases of violence against parents or children are also frequent.

⁹² According to the statistical data of the Superior Council of Magistrates, during the first 9 months of 2005, courts adopted final decisions in 380 domestic violence cases. Of these, 338 of the convicted were men and 42 were women. Buzău is the county with the highest number of domestic violence cases, followed by Prahova and Suceava.

⁹³ In practice, police and prosecutors tend to lump together various acts of violence regardless of whether they are committed against strangers or against family members.

There have been less numerous cases where the victim was someone other than the wife, parents, or children, such as siblings or even cousins.

- **Evidence in domestic violence cases - particularities**

The difficulty to produce evidence in domestic violence cases relies on the fact that such offenses take place in private spaces without witnesses, or in the presence of witnesses who may be biased because of the relationships they have with the parties – they may be relatives, partners etc. Another difficulty relates to the psychological state of the victim of domestic violence due to possible post-traumatic stress and possible pressure from the accused or other family members. Pressure is easily achieved in the family context and can also be placed on the witnesses. When analyzing evidence, courts have to be vigilant, since parties can sometimes “invent” the violence in order to obtain certain advantages, mostly of a material nature, such as eviction of the husband/relative from the household, custody of under-age children, money, or other assets.

Courts are often in situations where they must establish the facts based on insufficient evidence, yet, the decisions they adopt may have serious consequences on the parties involved in the case. In such cases, technical evidence is especially important. For example, forensic or medical certificates that would confirm the offense in combination with additional evidence could establish who the violator is.

In addition, witness testimonies may raise a number of issues. According to Article 80 of the CPC, witnesses can be related to the victim or the abuser and therefore can be biased or can choose not to testify. There are situations when witnesses did not see the violence but heard the victims scream (for example, neighbors, visitors etc). Also, witnesses often assert that, on the day the offense was allegedly committed, the victim called them and told them that he/she was battered. Hearsay testimonies need to be considered carefully in the absence of eye witnesses. Obviously, situations are more complicated in practice and the case law is not uniform in accepting evidence. Practices vary from convicting the defendant on the victim’s complaint only, to rejecting any witness testimonies. However, two trends have been identified:

- (i) Courts examine the evidence similar to any regular case. The judge analyzes the evidence strictly and often disregards the witness testimonies that are considered biased. It is very difficult to establish the facts in such conditions, especially if there are no medical certificates in the case. In such circumstances, the solution is often acquittal based on the reasonable doubt. It can be argued that, even in absence of medical certificates, if the victim shows wounds which he/she could not cause himself/herself, the court will have proof that an act of violence took place.
- (ii) Courts establish the facts of the case according to different evidence. In such situations, the courts rely on and compare medical certificates, the victim’s or the witnesses’ testimonies, and if the witnesses are related to the parties or have a personal interest in the case. The legal value of a witness deposition is still appreciated differently, and it mostly depends on the circumstances of the case:
 - a. In 2005, the First Instance Court of the 1st District of Bucharest convicted a defendant for assault and battery against his ex-wife. The Court stated that the defendant had battered the victim, and, in the absence of medical certificates, based its decision on eye witness testimony. The Court considered such testimony sufficient in the case and ordered the defendant to pay damages. Nonetheless, the decision was overturned on appeal by the Bucharest Tribunal, and the defendant was acquitted. The Tribunal stated that the offense was not sufficiently dangerous.
 - b. In 2002, the First Instance Court of the 5th District of Bucharest convicted a defendant for assault and battery and threat against his wife. Initially the defendant was prosecuted for attempted murder. The Court noted that the couple had a history of violence and

that the defendant hit his wife with his fists and a knife, and threatened to kill her and burn the house down. The Court based its decision on a medical certificate and the depositions of three eye witnesses. The decision was confirmed upon appeal.

- **Subjects of domestic violence cases**

Law no. 217/2003 on family violence classifies an offense as family violence when the victim is a family member of the defendant. Article 3 defines a “*family member*” as the spouse or close relative, as defined by Article 149 of the Penal Code.⁹⁴ Additionally, Article 4 of the Law provides that those “persons who established relationships similar to those between spouses or parent and child, as documented by a social services investigation benefit⁹⁵ from the effects of this law.”

The case law proves that the extensive definition of “*family members*” in Article 4 of the Law is not uniformly interpreted and applied by courts. According to some courts, Article 4 does not amend the relevant provisions of the Penal Code and therefore, do not take into consideration *de facto* relationships when deciding on the nature of the offense.

Other courts take Article 4 into consideration in different ways:

- (i) Some courts (Court of Appeals in Timișoara) have applied the provisions of Article 4 to spouses, dependent under-age children, close blood relatives, siblings and their children, and people who become related according to the Law if they live together with the perpetrator. Such courts enforced the Law on the sole condition that the relationships between the parties are stable and long-term, and are documented by the social services.
- (ii) Other courts have established that provisions of the Law are applicable not only to people who qualify as spouses and partners, but to parent-child relationships, and to dependent children and their guardians regardless of whether or not their relationship is based on a court decision (Court of Appeals in Bacău, Neamț Tribunal, the First Instance Courts in Roman and Piatra Neamț).
- (iii) Other courts have applied Article 4 to all persons who have similar relationships to those of spouses or parent and child if so documented by the social services investigation (Court of Appeals in Constanța).

In addition, the aggravating circumstances in Article 75 § 1 b of the Penal Code are not enforceable in cases of murder or violence against a family member (Articles 175 § 1 c), 180 § 1¹ and 181 §1¹). The aggravating circumstances cannot therefore be considered in case the legal definition of the offense already considers the victim as a family member.

Article 75 § 1 b allows for a harsher sentence when the offense was committed through cruelty, violence against family members, or other means or methods that represent public danger. Its applicability is therefore circumstantiated by the definition of the concept of family member in the Penal Code:⁹⁶

- a. In 2005, the Tulcea Tribunal sentenced the defendant to a 16 year prison term for murder. The Tribunal noted that the defendant had previously lived with the victim and her children. Due to repeated violence, the victim had moved out, and started a new relationship. The victim had, however, returned to the defendant during the spring break. On this occasion, the defendant hit the victim several times and seriously injured her. She went into a coma and died at the hospital.

⁹⁴ cf. Chapter 3.1.2.

⁹⁵ Some courts considered that the language of Article 4 allows extending the provisions of the law to these categories of persons only when they can *benefit* from it (i.e., if the law provides measures of protection), and that it does not change the legal classification of the offense.

⁹⁶ cf. Chapter 3.1.2.

The Tribunal did not consider that the defendant and the victim were family members and therefore, did not apply a harsher sanction.

- b. The High Court of Cassation and Justice, concerning an appeal filed in the interest of the law,⁹⁷ decided in 2005, that in cases of murder, aggravated circumstances under Article 75 § 1 b of the Penal Code are not applicable.

On the other hand, there are situations when the courts consider a formalistic approach and apply aggravated circumstances even though, in fact, the family relationship had already come to an end. In 2005, the Tulcea Tribunal convicted the defendant for murder against his wife while divorce proceedings were ongoing. However, the Tribunal applied a harsher sanction on the grounds that, on the date of the murder, the divorce decision had not become final. The restrictive conditions and applications of Article 149¹ of the Penal Code⁹⁸ appear to be discriminatory.

- **Specificities of offenses of assault and battery and other violence**

The extent of the concept of “*family member*” is especially problematic in cases of assault and battery and other acts of violence. Courts often do not take into account the legal status of the parties and, as a result, adopt incorrect decisions. Although the Penal Code allows for harsher sanctions when the victim of the violence is a family member (Articles 180 §§ 1¹ and 2¹ and 181 § 1¹), according to Article 149¹ of the Penal Code, the victim must live and contribute to the maintenance of the household together with the perpetrator. It can be argued that these legal provisions are too restrictive because they rule out close relatives who do not live with the perpetrator, including his/her children who are in the custody of and live with the other parent.

Also for assault and battery and other acts of violence, the Penal Code allows the magistrates to initiate *ex officio* investigations. Such provisions are intended to avoid situations when the victim is influenced by the abuser, and does not file or withdraws the complaint. In other situations, the victim is an under-age child, and neither the abusive parent nor the other parent files a complaint. In such circumstances, it is erroneous for the courts to consider a formalistic approach and dismiss the case because the victim did not file a complaint or did not meet the legal time limits for filing such a complaint. This is true especially in those situations when the victim expressed the will to see the abuser prosecuted and criminal proceedings have been initiated *ex-officio*. The following case law is therefore open to criticism:

In 2001, the First Instance Court of the 5th District of Bucharest convicted the defendant for assault and battery against his cousin. The court noted that the parties lived in the same building and that the defendant confessed to hitting the victim on one occasion. The defendant appealed this decision with the Bucharest Tribunal. The First Instance decision was overturned and criminal proceedings were closed on the grounds that the legal provisions of the preliminary penal complaint were not observed. The Tribunal considered that the complaint had been introduced by the victim’s mother and that the victim, 14 years old, did not confirm the complaint herself within the two-month delay, as required by the Law.

- **Assessment of the sentence by the courts**

When assessing the extent of the sentence, courts have different responses depending on the seriousness of the offense, the perpetrator’s profile, and, in general, on the criteria listed under Article 72 of the Penal Code.⁹⁹ However, according to the general trend, the fact that an offense was committed against family members is not considered to be an aggravating circumstance.

⁹⁷ “*Recurs în interesul legii*” in Romanian. This allows the General Prosecutor to seize the High Court of Cassation with a point of law that is differently applied by courts nationwide in order to promote a unitary interpretation.

⁹⁸ The victim must live and contribute to the maintenance of the household together with the perpetrator.

⁹⁹ These criteria include the social danger of the offense, the perpetrator’s profile, and the circumstances that can aggravate or extenuate criminal responsibility.

- a. In 2005 the Bucharest Tribunal convicted a defendant for murder and sentenced him to 12 years in prison. The Tribunal noted that the defendant was intoxicated when he stabbed his son with a knife and caused his death. The Tribunal did not consider that the facts of the case justified aggravating circumstances and took into consideration the age of the defendant, who was 74 at the time of the crime.
- b. Also in 2005, the Bucharest Tribunal convicted a defendant for attempted murder and sentenced him to 5 years in prison. It noted that the defendant hit his wife, daughter, and mother-in-law with an ax and that he hit vital organs, but did not cause their death. No aggravating circumstance was considered in the case, but the Tribunal did take into account the defendant's mental disorders.

In addition, courts appear to minimize the seriousness of such offenses and apply minor prison sentences even though the legislature intended to sanction more harshly offenses committed against members of the family.

There have been cases when the court applied higher penal fines:

In 2002, the First Instance Court of the 6th District of Bucharest convicted a defendant of assault and battery against his ex-wife and ordered the defendant to pay a criminal fine, as well as damages to the victim. The Court found that the defendant had forced the victim to get into a car with him, where he hit her with a rubber bat and burned her with an electroshock device. The victim's boyfriend witnessed the incident and called the police. The defendant was searched and it was discovered that he had a knife, a pair of tongs, a photo camera, a roll of large scotch tape, a black disguise, and a telescopic bat. The victim was injured and needed 14 days of medical care for complete recovery. The victim appealed the Court's decision arguing that the fine was too lenient a sentence for such a serious offense. The Bucharest Tribunal denied the appeal on the grounds that, although there were reasons to think that the defendant had premeditated his offense, he did not use the objects he was carrying. In addition, the Tribunal found that the defendant's behavior was not a dangerous one that should justify a prison sentence.

It can be argued that such a solution is open to criticism, since it would appear that the Tribunal did not correctly evaluate the circumstances of the case which would have justified a harsher sanction.

- **Assessment of moral damages by the courts**

When assessing moral damages, courts appear to follow the same trend as in determining the sentences. Courts do not generally consider that an offense against a family member is a factor to be considered when they establish the amount of damages the defendant is ordered to pay to the victim. According to the facts and circumstances of the case, the court may order the defendant to pay damages or may consider such a request unfounded and refuse to grant damages.

In 2005 the Constanța Tribunal convicted the 17 year old defendant and sentenced him to 5 years in prison for murdering his father. The Tribunal found that the father had repeatedly been violent towards his family. On the night of the murder, the defendant had asked him to put an end to the disturbance. The victim hit the defendant in the head, after which the defendant stabbed him with a kitchen knife. The victim died shortly thereafter. The Tribunal also ordered the defendant to pay damages to his under-age brother and, since the defendant was himself under-age, the Tribunal ordered that damages be paid by the defendant together with his mother in her position as the defendant's legal guardian. The sentence was reduced to 3 years by the Constanța Court of Appeals.

- **Enforceability of the safety measure under Article 118¹ of the Penal Code¹⁰⁰**

Courts have rarely applied the interdiction to return to the family residence and the data provided by the courts to the working group suggests that there may have been only two cases in which such safety measure was ordered: one in the First Instance Court of Constanța and the other in the First Instance Court of Bicăz:

In 2004, the First Instance Court in Constanța sentenced a defendant to 3 and a half years in prison for sexual corruption. The Court found that the defendant had repeatedly committed obscene acts in front of his under-age daughter and occasionally in front of his under-age son. The Court considered that the defendant had seriously endangered the children's health and mental development, and deprived the defendant of his parental rights for a period of 5 years. The Court relied on the evidence produced by the injured parties and found that the defendant had committed violent behaviors and had repeatedly hit family members who had asked him to behave properly in front of his under-age children. Consequently, the court decided that the defendant's presence in the family domicile was a threat to the other family members and ordered him not to return to the family domicile for one year after he completes his prison sentence.

The safety measure¹⁰¹ under Article 26 of Law no. 217/2003 was also applied in a very limited number of cases:

In 2004, the Prosecutor's office of the First Instance Court of the 4th District in Bucharest notified the Court, on the basis of Articles 26 and 27 of Law no. 217/2003, requesting that an interdiction to return to the family residence be issued against the defendant. The Court noted that the defendant had threatened to kill his wife, forced her to leave the family domicile, and had forbidden her to return. He told his daughter that he would go to his wife's place of work in order to stab her with a knife. He indeed went to his wife's place of work, but the wife called the police. When searched, the police found on him a kitchen knife. The Court granted the prosecutor's request and issued an interdiction to return to the family residence for a limited duration.

5.2.2. Situations in which a preliminary complaint is required

Although such offenses are common in practice, many of the cases do not reach the courts for various reasons, particularly because of the victim's state of fear or dependency (both sentimental and financial) towards the offender. Most of the cases stop at the level of law enforcement who tend to go to the site of the offense, apply an administrative fine to the perpetrator, and leave. This way of handling such a situation is done because often the injured party expressly states that she/he does not intend to file any complaint.

However, when the injured party wants to file a criminal preliminary complaint, they generally find it difficult to produce the necessary evidence. It is acknowledged that such acts take place in a private space, namely the family residence, and that eye witnesses are rare. In cases of assault and battery, it is even more difficult to establish the facts and the defendant's guilt when there is no medical certificate to prove that the victim was indeed injured. The courts must then rely on the depositions of the victim, the defendant and/or the potential witnesses who saw or, at least, heard the incident:

- a. In 2001, the Bucharest Tribunal, judging on an appeal, confirmed the decision of the First Instance Court who acquitted the defendant for lack of evidence. The victim, the defendant's wife, had filed a complaint for assault and battery and threat, but the Court had found that the

¹⁰⁰ Interdiction to return to the family residence for a limited duration. *cf.* Chapter 3.3.

¹⁰¹ *cf.* Chapter 3.3.

- offense could not be proven since it took place in the family residence, while the gate was locked, and no witness could see or hear what happened¹⁰².
- b. In 2002, the First Instance Court of the 6th District of Bucharest convicted a defendant for assault and battery and insult against his wife. The Court found that the parties were undergoing divorce proceedings and lived separately. While visiting his son, the defendant repeatedly hit and insulted his wife, both on the street and at the wife's residence where the incidents were witnessed by three neighbors. The Court ordered the defendant to pay a harsher criminal fine because he had tried to misinform the Court by producing false witnesses. These witnesses had stated that on the day of the incident they had been with the defendant out of town, but changed their depositions in court, and admitted that they had been asked by the defendant to give false statements.
 - c. In 2000, the First Instance Court of the 1st District of Bucharest closed criminal proceedings due to the late filing of the criminal preliminary complaint against a defendant who had been accused by his wife of assault and battery (Article 180 of the Penal Code). The injured party appealed this decision, and the Bucharest Tribunal overturned it on the grounds that the medical certificate produced by the victim showed that she had lost her sense of smell as a result of the incident. The Tribunal considered that the defendant should have been prosecuted for aggravated violence (Article 182 of the Penal Code), and that in such a case, a preliminary complaint was not required by the Law. The case was sent to the prosecutor's office for investigations of aggravated violence.

5.3. Principles in the case-law of the European Court of Human Rights that could be relevant to domestic violence cases

The European Convention on Human Rights (*“the Convention”*) imposes an obligation upon Member States to ensure that individuals under their jurisdiction fully enjoy their fundamental rights guaranteed by the Convention. The European Court of Human Rights (*“the Court”*) is called to verify the conformity of Member States' actions with the Convention. The case-law general principles have been extended progressively, and some of them could be applied to domestic violence cases.

5.3.1. Positive obligations that Member States must comply with

According to the Court's consistent case-law, Member States must not only refrain from actions that would impede the individuals from enjoying their fundamental rights, but must also take **positive actions** necessary for an effective protection of these rights. The jurisprudential principle of positive obligations is applicable to those articles of the Convention that are relevant to domestic violence issues, namely Articles 2, 3, and 8.

- **Article 2 of the Convention**

Under Article 2 of the Convention,¹⁰³ States have a positive obligation to take all steps necessary for an effective protection of the right to life by adopting an effective criminal legislation that discourages the commission of acts which could endanger a person's life and providing all the mechanisms to ensure the legislation's application. For domestic violence cases, this could mean that the State has an obligation to adopt protection measures for possible victims, particularly restriction orders, and make available efficient steps for their enforcement with the help of law enforcement.

¹⁰² The solution is debatable since the Court did not cite the provisions of the Penal Code on assault and battery against family members, although these provisions had already entered into force.

¹⁰³ Article 3 addresses the right to life.

In the *Osman v. the United Kingdom* case¹⁰⁴ the Court went further, and found that the State authorities have the obligation, under well defined circumstances, to take preventive practical steps in order to protect an individual whose life is threatened by the criminal acts of another individual. In this case, a teacher harassed one of his pupils whose family had continually reported the incidents to the police. Despite police intervention on several occasions, the teacher persisted with his behavior and eventually injured the pupil, and killed his father. The Court found that, in the instant case, the police did everything that could have been reasonably expected in order to avoid a real and immediate risk for the pupil's life. The case is relevant, although it does not involve domestic violence, because it sets a general principle that States have the obligation to take practical steps in order to protect one's life. If the individual informs the State authorities of a possible threat to his life, a lack of active involvement of law enforcement may lead to a condemnation of the State by the Court.

The States' positive obligation also includes an obligation to conduct an official and effective investigation, even when a victim's death was caused by a third party.¹⁰⁵

- **Article 3 of the Convention**

Under Article 3 of the Convention,¹⁰⁶ States have a positive obligation to take all necessary steps to ensure an effective protection of any individual against torture and inhuman or degrading treatments. This includes an obligation to draft legislation that criminalizes such acts, and to ensure its effective enforcement through criminal proceedings and investigation.

The positive obligation applies even when the acts of torture or ill-treatment are caused by private individuals. In the cases *A. v. the United Kingdom*, *Z. et. al v. the United Kingdom*, and *E. v. the United Kingdom*,¹⁰⁷ the Court found that Article 3 of the Convention had been violated because the British authorities did not take any protection measures for four children that had been subjected for four years to ill treatment by their families. In these cases the Court decided that the British State had a positive obligation to order the children's placement since social services were fully informed of the ill-treatments.

It is the Court's consistent approach that, in certain situations, Article 3 imposes a positive obligation to conduct an official investigation, and that such positive obligation cannot be limited, in principle, to cases when ill-treatment is the act of governmental agents.¹⁰⁸ According to the Strasbourg case-law, the understanding of the concept of official investigation implies that Member States must make all efforts necessary to identify and hold liable the responsible persons. This obligation is assessed according to the means employed by State authorities, and not to the results achieved. Article 3 of the Convention does not necessarily require conviction of the perpetrator, but an effective investigation capable of identifying and convicting the responsible persons. State authorities must make effective legal remedies available to any person who files a complaint and who has an arguable claim that he/she has been subjected to treatments contrary to Article 3. Even in the absence of such a complaint, however, investigations must be initiated if the State authorities have sufficient and precise indications that an individual was subjected to torture or ill-treatment.¹⁰⁹

¹⁰⁴ ECHR, *Osman v. the United Kingdom*, 28 October 1998.

¹⁰⁵ ECHR, *Alex Menson, et. al v. the United Kingdom*, 6 May 2003; cf. ECHR, *Akkoç v. Turkey*, 10 October 2000.

¹⁰⁶ Prohibition of torture, inhuman and degrading treatments.

¹⁰⁷ ECHR, *A. v. the United Kingdom*, 23 September 1998; cf. ECHR, *Z. et. al v. the United Kingdom*, 10 May 2001, *E. v. the United Kingdom*, 26 November 2002.

¹⁰⁸ cf. among others the *Pantea v. Romania* case (ECHR, *Pantea v. Romania*, 3 June 2003). In this particular case, the applicant was severely beaten by two cell mates while serving a prison term. The prison staff did not respond in any way and an effective investigation was not conducted, as required by the Convention.

¹⁰⁹ The principle of an effective investigation is relevant in this context, particularly with regard to the Romanian Code of Criminal Procedures which provides for *ex officio* investigations of offenses that are related to domestic violence. Practice shows that these provisions are rarely applied. cf. also Chapter 3.2.2.

- **Article 8 of the Convention**

Under Article 8 of the Convention,¹¹⁰ States have the negative obligation to refrain from any interference with the private and family life of individuals that does not meet the criteria in paragraph 2 of Article 8.¹¹¹ Interference with private and family life is therefore limited to exceptional circumstances.

Member States have also a positive obligation to secure the right for respect of the private life even within the sphere of private relations among individuals.¹¹² In *Airey v. Ireland*¹¹³ the Court states that, according to Articles 3 and 8 of the Convention, Member States have the positive obligation to ensure effective protection against domestic violence. In this case, the Court found that the Irish legal provisions that prevented the indigent applicant from obtaining legal assistance during divorce proceedings violated Article 8, since the applicant needed protection from her alcoholic and violent husband.

The issue of domestic violence is also at the center of *Whiteside v. the United Kingdom*¹¹⁴ in which the past relationship between the applicant and her former partner was found to be inadmissible by the former European Commission of Human Rights. The applicant argued that the British law did not provide any remedy in order to offer her protection against the harassment of her former partner. The Commission confirmed the Court's established precedence that the States' obligation to secure the effective exercise of the rights guaranteed by the Convention implies adoption of practical steps even within the sphere of private relations between individuals. The Commission recalled that the level of harassment in such situations, which may consist of verbal or physical aggression, destruction of property, or stalking, may engage the State's responsibility as a result of the positive obligation to secure an individual's right to private life. However in the instant case, the Commission contradicted the applicant's arguments, and found that the British law made legal remedies available to her, and that she had not exhausted them, as required by the Convention.

5.3.2. Scope of the notion of 'family life'

Article 8 of the Convention refers to the 'right to respect for family life'. The concept of family life has evolved steadily and, contrary to the Romanian definition in the Penal Code,¹¹⁵ the Court maintains a **flexible approach to the interpretation of the "family life" definition**. The scope of this notion is relevant to domestic violence, since the Court's broad interpretation expands the categories of persons that can be considered victims or perpetrators in domestic violence cases.

The Court has taken into consideration the evolution of public morals, modern family arrangements, and the implications of divorce or of medical advances. If a family based on marriage is necessarily protected by Article 8, marriage is not a compulsory condition for the Article to be applicable. In *Johnston v. Ireland*,¹¹⁶ the Court established that unmarried couples who live together with their children normally enjoy family life, on the condition that the relationship has a stable nature, and is otherwise undistinguishable from the family based on marriage. In addition, cohabitation is not a *sine qua non*

¹¹⁰ Right to respect for private and family life.

¹¹¹ Interference in private or family life must be in accordance with the law and necessary in a democratic society in the interests of national security, public safety, or the economic well-being of the country; for the prevention of disorder and crime; for the protection of health or morals; or for the protection of rights and freedoms of others.

¹¹² ECHR, *X. and Y. v. the Netherlands*, 26 March 1985.

¹¹³ ECHR, *Airey v. Ireland*, 9 October 1979.

¹¹⁴ ECHR, *Whiteside v. the United Kingdom*, 7 March 1994.

¹¹⁵ cf. Chapter 3.1.2.

¹¹⁶ ECHR, *Johnston v. Ireland*, 18 December 1986

condition and family members who do not live together, whether by divorce, separation, or arrangement, may nonetheless enjoy the protection of Article 8.¹¹⁷ The Court will always carefully analyze all the circumstances of the case in order to establish if they fall under the scope of Article 8. Nonetheless, with regard to the relationship between parent and child, the case-law is uniform,¹¹⁸ and the Court relies on a presumption that Article 8 applies automatically to such a relationship, regardless of its nature.¹¹⁹

Article 8 also applies to cases dealing with enforcement of national courts' decisions on child custody. The Court's case-law has extended the scope of Article 8 to recognize a parent's right to benefit from adequate steps taken by the State in order to allow the parent to live together with his/her child. The positive obligation that lies with the State concerns the adoption of an effective legal framework on enforcement procedures.

In *Ignaccolo-Zenide v. Romania*,¹²⁰ the Court established that in such cases, effectiveness implies a speedy intervention. Indeed, proceedings related to the exercise of parental authority, including the enforcement of final decisions, must be dealt with on an emergency basis because the passing of time may have irreparable consequences on the relationships between parent and child if they do not live together. The Court found that the Romanian state violated Article 8 and that the condition of speedy intervention was not observed, despite the fact that an emergency procedure took place and a provisional order was issued.

¹¹⁷ ECHR, *Berrehab v. the Netherlands*, 21 June 1998 (divorce) and ECHR, *Kroon and Ors v. the Netherlands*, 27 October 1994 (unmarried).

¹¹⁸ ECHR, *Boughanemi v. France*, 24 April 1996 (no cohabitation) and ECHR, *Söderbäck v. Sweden*, 28 October 1998 (adoption).

¹¹⁹ The Court has even held in the *X, Y and Z v. United Kingdom* case that the relationship between a female-to-male transsexual and his child born by artificial insemination amounted to family life. The Court based its decision on the grounds that the relationship was otherwise indistinguishable from that enjoyed by the traditional family.

¹²⁰ ECHR, *Ignaccolo-Zenide v. Romania*, 25 January 2000.

CONCLUSIONS

As noted in the preliminary project report (drafted in February 2007), discussions with project participants (working group, seminar attendees, faculty, and CEELI legislative team) confirmed that it was premature to identify “best practices” in the handling of domestic violence (DV) cases, short of a clear and workable legal framework. As well, the effective enforcement of the law is jeopardized in practice by a difficult access to legal aid; and the institutional framework suffers from an overabundance of, and overlapping competence of the many institutions covering the field – a labyrinth that confuses vulnerable victims and prevents an effective support system.

Law 217/2003 on the Prevention of Family Violence tends to prioritize the re-unification of the family over the rights of victims, and does not protect sufficiently victims of domestic abuse.

- For example, there exists no effective instrument to ensure victims’ safety, such as a restraining order. Safety measures under the Penal Code cannot be invoked to restrain the abuser (from returning to the domicile or from harassing the victim), and Law No. 217/2003 confuses safety and preventive orders¹²¹. While some restraining order language was developed in 2004/2005 by the National Coalition for Domestic Violence (NCDV), judges and prosecutors involved in this project found the language obscure and quasi impossible to apply, and called for clear, legal texts that would regulate both civil and criminal restraining orders. They cautioned however about the necessity to carefully coordinate such new provisions with general norms in the Penal Code.
- The Law No. 217/2003 language provides for the mediation of domestic disputes, but is inconsistent with the new Mediation Law, does not build in safeguards necessary for vulnerable parties, and encourages a “family council” to settle the dispute – a mechanism seldom if ever resorted to, but potentially hazardous to victims in cases of serious recurring abuse.

The further conclusion was that provisions of the Romanian laws in force require a serious overhaul.

Early on in the project, WG members pointed out that the Penal Code defines the concept of “family member” in an over-restrictive manner, and do not consider domestic violence as a specific offense. On the other hand, Law no. 217/2003 includes *de facto* situations (such as common-law), but does not define DV related crimes or sanctions, or procedures for magistrates to follow. As a result, the Family Protection Law is not enforceable because it does not have the status of special *criminal* law and, as such, its definitions cannot prevail over those of the Penal Code. As demonstrated in seminar discussions, coordination between the Codes and Law 217/2003 proves difficult, leads to divergent interpretations (an obstacle to predictability of the law); and, under existing legislative provisions, magistrates cannot address many acts of domestic violence as such.

The interim report indicated that such overhaul can be handled through the drafting of a new special criminal law to replace Law No. 217/2003 (see draft language at Annex IX); amendments to the

¹²¹ In Romania, “safety” measures, such as compulsory medical treatment, are designed to eliminate a state of danger (protect the general public); while “preventive” measures, such as holding the defendant in custody prior to trial, can be ordered to prevent the defendant from carrying out activities that could jeopardize criminal proceedings (intimidating witnesses or destroying evidence).

current one; or introduction of new juridical provisions in the penal and civil codes – supplemented by a legal norm which defines inter-institutional services attributions and responsibilities¹²².

In the meantime, the Commission in charge of revising the penal code released its draft for public comments on March 2, 2007. The revised code expands the definition of “family members”¹²³ and the new language appears to be consistent with that of Law no.217/2003. Also, the Commission proposes to increase penalties for crimes¹²⁴ committed against a family member (as newly defined). The new draft however does not include sufficient language to assure victims’ protection, such as restraining orders or other measures¹²⁵. At this writing, it is not clear when the new penal code will be adopted, or whether Law No.217/2003 will be revised.

In summary, this report hopes to provide the information necessary for decision makers to produce a thoughtful rewrite of the laws (see Chapters III. and IV.). Further, as discussed in Chapter IV – 3, the inter-institutional network of services needs to be streamlined and coordinated, in order to produce results and serve victims properly. As essential, a systematic, local intervention capacity closely coordinated with law enforcement and prosecutors is imperative for the protection and safety of victims – adults and children alike. These are essential pre-conditions that challenge the imagination and will of governmental and civil society institutions, if victims of domestic violence are to be helped effectively in Romania.

¹²² When polled on this question during seminars, magistrates were divided: some preferred amendments to the penal codes, with a separate law that covers inter-institutional provisions. Others preferred a new special criminal law dealing exclusively with DV questions.

¹²³ **Art. 178 Family members**

(1) “Family members” include:

- a) the ascendants and the descendants, siblings, their children, as well as the persons who became such relatives following adoption, according to the law;
- b) spouses;
- c) those persons who established relationships similar to those between spouses or parents and children, if they co-habit.

¹²⁴ For murder, qualified murder, violence, physical injury, and violence causing death.

¹²⁵ On March 26, CEELI sent a letter to the Ministry of Justice to applaud the proposed changes, but also to recommend that restraining orders language be added in the final text or in the new code of criminal procedures.

ANNEXES



Calendar of the Working Group Meetings

Month	No.	Week	Subject	Leader
November 2005	1.	21-25 November	Preparatory Meetings	
December 2005	2.	28 November - 2 December	1. General Considerations <ul style="list-style-type: none"> ▪ The general legal framework concerning family violence in Romania. Area of application. ▪ How other states deal with family violence in their legislation. 	Rodica NIȚĂ
	3.	5-9 December	2. Controversial aspects and unclear legislation concerning family violence. <ul style="list-style-type: none"> ▪ The family violence concept. ▪ Provisions in the Penal Code and the Criminal Procedure Code regarding family violence. 	Aura Manuela COLANG
	4.	12-16 December 19-23 December	<ul style="list-style-type: none"> ▪ Provisions in the Penal Code and the Criminal Procedure Code regarding family violence. Postponed	Mihaela Stoian
January 2006	5.	9-13 January	<ul style="list-style-type: none"> ▪ Content and procedures in mediations. Aspects of practice. ▪ Clarification of Art. 20, line 2 of Law No. 217/2003. ▪ Is mediation possible during the penal process? 	Ionut DURNESCU
	6.	16-20 January	<ul style="list-style-type: none"> ▪ Who are the people responsible for dealing with cases of family violence? ▪ Legal assistance to victims in shelters (Art. 24, lines 1 and 2 of Law No.217/2003). Practical aspects. 	Aura Manuela COLANG Traian MARINESCU
	7.	23-30 January	Protective measures for victims of family violence (Art. 113-114 Penal Code) and restriction orders.	Raluca MOROȘANU
	8.	30 January-3 February	Civil aspects of the law in dealing with family violence (ex. custody on minor children, evicting the aggressor from the common dwelling).	Georgiana FUSU
February 2006	9.	6-10 February	Courts perspective on the application of controversial aspects and vague legislation dealing with family violence (theoretical aspects and applications of the laws).	Ștefan CRIȘU
	10.	13-17 February	3. Romanian courts' jurisprudence on matters of family violence. Jurisprudence of the European Court for Human Rights.	Raluca MOROȘANU
	11.	20-27 February	4. Romanian courts' jurisprudence on matters of family violence. Jurisprudence of the European Court for Human Rights - continued.	Raluca MOROȘANU
	12.	27 February - 3 March	5. Institutional Aspects <ul style="list-style-type: none"> ▪ Specific responsibilities of institutions involved in combating family violence, with a focus on the judiciary. Practical aspects. ▪ Inter-institutional coordination in the area of combating family violence. Practical aspects. ▪ Practical aspects in the application of the laws and the prosecution of cases. The role of the National Agency for the Family Protection. 	Aura Manuela COLANG

Calendar of Seminars

No.	Location	Date	Participants	Trainers
1.	Iași	7-8 June 2006	19 judges	Sofia Luca Raluca Moroșanu
2.	Alba Iulia	15-16 June 2006	21 judges	Sofia Luca Raluca Moroșanu
3.	Timișoara	26-27 June 2006	21 judges	Sofia Luca Raluca Moroșanu
4.	Brașov	2-3 November 2006	23 judges	Raluca Moroșanu Simona Franguloiu
5.	Craiova	16-17 November 2006	30 judges	Raluca Moroșanu Simona Franguloiu
6.	Ploiești	14-15 December 2006	21 judges	Raluca Moroșanu Simona Franguloiu
7.	National School of Court Clerks	4 April 2007	100 student clerks	Raluca Moroșanu
8.	Bucharest	18 April 2007	16 prosecutors 2 representatives from the National Agency for Family Protection	Raluca Moroșanu Radu Moisescu

American Bar Association/Central Europe and Eurasia Legal Initiative (ABA/CEELI)
National Institute of Magistrates (INM)

AGENDA

„Family Violence – theoretical and practical aspects” - seminar for judges

Trainers: **Raluca Moroşanu** – judge, Bucharest Court of Appeals
Sofia Luca – judge, Iaşi First Instance Court¹²⁶
Simona Franguloiu – judge, Braşov Court of Appeals¹²⁷

Day 1

- 9.00 – 9.30: Opening remarks of the seminar
- 9.30 – 10.30: The concept of family violence: definition, appearance, stereotypes
- 10.30 – 11.00: Coffee break
- 11.00 – 12.30: Case Study I
- 12.30 – 14.00: Lunch
- 14.00 – 15.00: Case Study II
- 15.00 – 15.30: Coffee Break
- 15.30 – 16.30: Case Study II (continued)

Day 2

- 9.00 – 10.45: Case Study III
- 10.45 – 11.15: Coffee break
- 11.15 – 12.30: Law no. 217/2003: necessity, applicability, perfectibility (discussions and proposals)
- 12.30 – 14.30: Lunch

AGENDA

*„Family Violence – theoretical and practical aspects” - seminar for prosecutors ** **Bucharest, 18 April 2007**

Trainers: **Raluca Moroşanu** – judge, Bucharest Court of Appeals
Radu Moisescu – prosecutor, DIICOT, Iaşi Office

- 9.30 – 9.45: Opening remarks for the seminar
- 9.45 – 10.45: The concept of family violence: definition, appearance, stereotypes
- 10.45 – 11.00: Coffee Break
- 11.00 – 12.30: Case Study I
- 12.30 – 14.00: Lunch
- 14.00 – 15.30: Case Study II
- 15.30 – 16.00: Law no. 217/2003: necessity, applicability, perfectibility (discussions and proposals)

* Seminar financed through Fund no. 2006-AB-CX-0001 in accordance with the United States Department of Justice, Criminal Division, Office of Overseas Prosecutorial Development, Assistance and Training (OPDAT).

¹²⁶ Seminars in Iaşi, Timişoara and Alba Iulia

¹²⁷ Seminars in Braşov, Craiova and Ploieşti.

List of documents sent to participants

1. Law Nr. 217/2003 on 22/05/2003 on Preventing and Combating Family Violence
2. Ordinance No. 95/2003 on 24/12/2003 on amendments and additions to Law no. 217/2003 on Preventing and Combating Family Violence
3. Study concerning the regulation of family violence in other states' legislations
4. Law No. 211/2004 on 27/05/2004 on Measures for Providing Protection of Offence Victims
5. Extract of Law No. 356/2006 on amendments and additions to the Criminal Procedures Code as well as on amendments to other laws.¹²⁸
6. Extract of Law no. 272/2004 on the Promotion of Children and of Child's Rights¹²⁹

¹²⁸ Document sent in the November-December 2006 and April 2007 sessions.

¹²⁹ *Idem*.

Powerpoint Presentation¹³⁰

Family violence

- Family violence involves any physical or verbal abuse committed intentionally by a family member against another family member that causes physical, psychological, sexual or economic harm. (Law no. 217/2003)
-

Domestic violence

- Domestic violence consists of a series of behaviors systematically repeated, such as physical, verbal, psychological, sexual or economic abuse of any family member, relative or in common law situations/ cohabitation.
 - Acts of violence tend to take place behind closed doors, in a private environment.
-

As a behavior, domestic violence has:

- **an instrumental** characteristic: the aggressor controls the victim, and obtains what he/she wants from the victim;
 - **an intentional** characteristic: it occurs with the intent to control, to dominate, and to maintain power; and
 - **an acquired** characteristic: violence is not inherent but learned through imitation.
-

Forms of domestic violence

- Physical violence;
 - Psychological violence (including emotional and verbal violence);
 - Sexual violence;
 - Economic violence;
 - Social violence.
-

Myths about domestic violence:

- Domestic violence is not that widespread or that serious;
- Consumption of alcohol is the cause of domestic violence;
- Violent individuals are unable to control their violence;
- Violent individuals are mentally ill or have psychopathic personalities;
- Some individuals deserve to be abused: they are the cause of the abuse;
- Some people enjoy being abused;
- Domestic violence occurs only in poor communities and among the uneducated;
- If violence were that serious, a woman would break up the relationship with her partner.

¹³⁰ This presentation was prepared with the assistance of Mr. Cătălin Luca, Executive Director of the Social Alternative Association of Iași, and of Ms. Sofia Luca, judge of the Iași Tribunal.

CASE STUDIES

Seminars in IAȘI, ALBA IULIA, TIMIȘOARA – June/2006 (judges)

CASE STUDY NO. I

AB and AC are spouses who separated 2 years ago. AD, their 13 years old son, lives with his mother (AB).

On January 13, 2006, the father (AC) went to the school where his son is enrolled. He had a chat with his son's teacher, and found out that the child risked failing three courses. The father waited for the child to get out of school and, in front of his classmates, hit him and threatened to kill him should he fail those courses.

On January 14, 2006, AB filed a preliminary criminal complaint with the court, on behalf of and for minor AD, for the offences of „hitting” and „threatening”. She also sent a medical (forensic) certificate confirming that AD had injuries which required 7-8 days of medical care.

During the first audience (February 1, 2006), the court heard the victim (minor AD) in the presence of his mother and of defendant AC. The defendant admitted that he had hit and threatened the minor, but said that this was a simple, necessary punishment because the child was not serious about school. The intention of the threat was to scare him into studying harder.

The court agreed to hear two witnesses to the incident, MN and SL, AD's school mates. MN testified during the first hearing. He stated that he was present when AC hit and threatened minor AD, and mentioned that he had witnessed numerous situations when minor AD was hit and threatened by his father, AD, in the schoolyard.

The case was adjourned in order to hear witness SL.

At the next hearing (March 1, 2006), the two spouses, AB and AC, appeared before the court, and the mother stated that she wanted to withdraw her criminal complaint. Minor AD told the court, however, that he disagreed with his mother, since his father had a violent behavior towards him, and he wanted to put an end to this situation. In view of the minor's statement, the prosecutor present at the session announced that he would initiate a criminal action against the defendant *ex officio*.

Questions:

1. *What is the cause of action?*
2. *How do you think the court should decide?*

CASE STUDY NO. II

-Part I-

AB and CD are common law spouses who have lived together for 12 years with TS, AB's son from a different relationship whom they raised together. TS is 13 years old, a minor.

On 10.12.2005, AB filed a criminal complaint with the police, stating that, three days before, both she and her son had been hit with a bat by CD, who had come home drunk. Mother and son went to the

National Institute of Forensic Medicine for an expertise, and doctors prescribed 24-26 days of medical care for AB, and 22-24 days for TS.

According to the depositions of witnesses (common law spouses' neighbors), the relationships between the two had worsened in the past year because CD had begun to abuse alcohol frequently and created disturbances in the house. Neighbors had had to intervene on numerous occasions, and to take AB to the hospital.

The prosecutor initiated criminal proceedings for two concurrent offences, specified by Article 181, paragraph 1 (1) of the Penal Code, and asked the court to issue a temporary safety measure under Articles 26 and 27 of Law no. 217/2003 on Preventing and Fighting Domestic Violence, to prohibit the defendant from returning for a determined period of time to the shared household.

The first instance court rejected the request, on grounds that *procedural* requirements were not met, since AB, minor TS and CD were not related family members as defined by Article 149 of the Penal Code.

Questions:

1. *What is your opinion on the legality of the prosecutor's request for a temporary safety measure?*
2. *Is the court decision and its rationale consistent with the law? Please develop arguments in support of your answer.*

CASE STUDY NO. II

-Part II-

Situation I

Assuming the court had admitted the request for a temporary safety measure specified by Articles 26 and 27 of Law no. 217/2003, and considering the factual situation presented in part I of the case study, how should the first instance court have decided on the prosecutor's motion?

Please, develop arguments in support of your answer.

Situation II

In your opinion, how should the court have found if the house was a joint property of the two common law spouses?

Please, develop arguments in support of your answer.

Situation III

What if, in the same factual situation, the house was the defendant's exclusive property?

Please, develop arguments in support of your answer.

CASE STUDY NO. II

-Part III-

On September 23, 2004, a notification was filed with the First Instance Court of the 7th Sector in Bucharest by the Prosecutors' Office attached to this court under provisions of Articles 26 and 27 of Law no. 217/2003 on Preventing and Fighting Domestic Violence, corroborated with provisions of

Articles 111 and 112, point g. of the Penal Code. In their motion, prosecutors asked the court to order a temporary safety measure against defendant M.T., who was under investigation for offences specified by Article 1, paragraph 1, point 1 of Law no. 61/1991 and by Article 193 of the Penal Code. In support of their motion, prosecutors invoked Article 33, point a. of the Penal Code, which prohibits the defendant from returning to the family home for a determined period of time.

File no. 9931/P/2004 of the Prosecutors' Office of the 7th Sector First Instance Court of Bucharest was attached to the notification.

At the first hearing, the court, upon review of the documents contained in the file, found these facts: on September 20, 2004, following an argument between M.M, the plaintiff, and her husband M.T., the defendant, regarding the payment of some debts, an altercation took place, during which the latter threatened M.M. to kill her, hit her and chased her out of the home. As a result, the plaintiff had to live with her son, since the defendant refused her access to the house.

On the evening of September 22, 2004, the defendant sharpened a large kitchen knife with a blade of approximately 22 cm, showed the knife to his daughter M.G., and told M.G. that the next day he would wait for the plaintiff at her job, and attack her.

On the morning of September 23, 2004, the defendant took the knife and went to the plaintiff's workplace. When she noticed his presence, she called the police. Following a body search, law enforcement found the knife, hidden in a bag.

A criminal investigation was initiated against the defendant for committing offences as stipulated in Article 1, paragraph 1 of Law no. 61/1991 and Article 193 of the Penal Code, and consistent *with the application* of Article 33, point a. of the Penal Code.

Question:

In view of the facts of the case, as well as of the produced evidence, how should the court decide on the motion requesting a temporary safety measure in the first instance court? Please arguments in support of your answer.

CASE STUDY NO.III

DESCRIPTION:

Defendant Mariana has a 14 year old daughter, Alina, from a previous marriage. As of September 2003, Mariana began a common-law relationship with defendant Marcel, and they started to live together along with the defendant's daughter.

Approximately two months after this common-law relationship began, Marcel started to behave violently against Alina, slapping her several times and telling her that, from now on, he would have intercourse with her anytime he pleased. This took place in front of the minor's mother, Mariana, who did not react in any way. The defendant told Mariana to go to the bedroom, and then took Alina to the living room where he asked her to take off her clothes. Alina refused to do so but Marcel took her clothes off and had full sexual intercourse with her, against her will. As a result of repeated acts violence against her, Alina stopped offering any resistance, and the defendant continued to have sexual intercourse with her. The prosecutor, however, was unable to establish accurately the frequency of such intercourse. In April 2004, Marcel was surprised by his own daughter, who was living with them for a short while, while he had sexual intercourse with Alina. As a rule, while the defendant had sexual intercourse with the minor, her mother, defendant Mariana, was home but did not intervene. She just beat her daughter after each sexual encounter, accusing her of stealing her man.

For having forced sexual intercourse with Alina between December 2003 until April 2004, accompanied with violence and threats, defendant Marcel was sent to trial for committing the offence of repeated rape.

Since defendant Mariana, as Alina's legal guardian, tolerated the fact that Marcel had sexual intercourse with her daughter, without taking any steps to protect her or to secure a climate of morality in the home, and, through her conduct, seriously jeopardized Alina's physical, intellectual and moral development, she was sent to trial for bad treatments applied to a minor.

CHARACTERS:

Marcel
Mariana
Alina
The Judge

MARCEL

He is 45 years old, attended school through the 8th grade, is working with a commercial company, and does not have a criminal record. He was married previously, and has a daughter who lives with his former wife. At the time when the alleged crimes were committed, he lived in his common-law spouse's apartment. Marcel maintains that he is innocent, does not admit that he committed any crime, and claims that he got into this situation due to Alina's vengeful attitude, for she wants to hide the fact that she has begun to have sex with other boys.

MARIANA

She is a 38 years old housewife. She is divorced, and has a daughter (Alina) from a previous marriage. She believes that her daughter „is stealing her man”. She hates her and her common law spouse's cold behavior towards her is Alina's fault. She claims that Alina is a bad girl who entices Marcel to have sexual intercourse with her.

ALINA

She is 14 years old and a pupil in the 8th grade. She states that she is stressed out by what happened, is depressed and anxious; she claims that she suffers from abdominal pain, from lack of appetite, and from nightmares about the sexual abuse she has suffered. She has problems at school and wants to run away from home. Alina says that her mother should not be blamed at all for what happened. She says that her mother beats her just because she loves Marcel very much. .

ROLE PLAY

The judge will hear the minor for about 5/10 minutes.

The seminar room is arranged like a courtroom

4 main actors + 3-5 volunteers are necessary.

Main actors:

The judge (may be assisted by one-two judge colleagues, like in a court panel):

- may select two-three other seminar participants to consult with before and during the role play (a scene of the trial);
- may appoint other individuals to participate in the role play, such as defense counsels and/or prosecutors etc.

Alina – damaged party

Marcel – defendant

Mariana – defendant

Observers: other attendees

Seminars in BRAȘOV, CRAIOVA, PLOIEȘTI
– November/December 2006¹³¹ (judges)

CASE STUDY NO. I

AB and AC are spouses who separated 2 years ago. AD, their 13 years old son, lives with his mother (AB).

On September 13, 2006, the father (AC) went to the school where his son is enrolled. He had a chat with his son's teacher, and found out that the child risked failing three courses. The father waited for the child to get out of school and, in front of his classmates, hit him and threatened to kill him should he fail those courses.

On September 14, 2006, AB filed a preliminary criminal complaint with the court, on behalf of and for minor AD, for the offences of „hitting” and „threatening”. She also sent a medical (forensic) certificate confirming that AD had injuries which required 7-8 days of medical care.

The prosecutor has conducted investigations in the case and, on October 10, 2006, through a public prosecutor's indictment, decided to send defendant AC to court for the offences mentioned in the preliminary complaint.

During the first hearing, the court heard the victim (minor AD) in the presence of his mother and of defendant AC. The defendant admitted that he had hit and threatened the minor, but said that this was a simple, necessary punishment because the child was not serious about school. The intention of the threat was to scare him into studying harder.

The court agreed to hear two witnesses to the incident, MN and SL, AD's school mates. MN testified during the first hearing. He stated that he was present when AC hit and threatened minor AD, and mentioned that he had witnessed numerous situations when minor AD was hit and threatened by his father, AC, in the schoolyard.

The case was adjourned in order to hear witness SL.

At the next hearing, the two spouses, AB and AC, appeared before the court, and the mother stated that she wanted to withdraw her criminal complaint. Minor AD told the court, however, that he disagreed with his mother, since his father had a violent behavior towards him, and he wanted to put an end to this situation. In view of the minor's statement, the prosecutor present at the session announced that he would initiate a criminal action against the defendant *ex officio*.

Questions:

1. *What is the cause of action?*
2. *How do you think the court should decide?*
3. *How do you think the court would have decided if AB had withdrawn her complaint during the criminal proceedings, and the prosecutor had decided to send the defendant to court, based on what minor AD stated? Do you think that court notification would have been legal?*

CASE STUDY NO. II

-Part I-

AB and CD are common law spouses who have lived together for 12 years with TS, AB's son from a different relationship whom they raised together. TS is 13 years old, a minor.

¹³¹ The case studies have been revised, in order to reflect the amendments to the Criminal procedures Code made by Law no.356/2006, as well as suggestions and comments made by the participants in the first three seminars.

On 10.12.2005, AB filed a criminal complaint with the police, stating that, three days before, both she and her son had been hit with a bat by CD, who had come home drunk. Mother and son went to the National Institute of Forensic Medicine for an expertise, and doctors prescribed 24-26 days of medical care for AB, and 22-24 days for TS.

According to the witnesses' depositions (PT and CN), the common law spouses' neighbors, the relationships between the two had worsened in the past year because CD had begun to abuse alcohol frequently and created disturbances in the house. Neighbors had had to intervene on numerous occasions, and to take AB to the hospital.

The prosecutor initiated criminal proceedings for two concurrent offences, specified by Article 181, paragraph 1 (1) of the Penal Code, and asked the court to issue a temporary safety measure under Articles 26 and 27 of Law no. 217/2003 on Preventing and Fighting Domestic Violence, to prohibit the defendant from returning for a determined period of time to the shared household.

The first instance court rejected the request, on grounds that *procedural* requirements were not met, since AB, minor TS and CD were not related family members as defined by Article 149/1 of the Penal Code.

Questions:

1. *What is your opinion on the legality of the prosecutor's request for a temporary safety measure?*
2. *Is the court decision and its rationale consistent with the law? Please develop arguments in support of your answer.*

CASE STUDY NO. II -Part II-

Situation I

Assuming the court had admitted the request for a temporary safety measure specified by Articles 26 and 27 of Law no. 217/2003, and considering the factual situation presented in part I of the case study, how should the first instance court have decided on the prosecutor's motion?

Please, develop arguments in support of your answer.

Situation II

In your opinion, how should the court have found if the house was a joint property of the two common law spouses?

Please, develop arguments in support of your answer.

Situation III

What if, in the same factual situation, the house was the defendant's exclusive property?

Please, develop arguments in support of your answer.

CASE STUDY NO. II -Part III-

On September 23, 2004, a notification was filed with the First Instance Court of the 7th Sector in Bucharest by the Prosecutors' Office attached to this court under provisions of Articles 26 and 27 of Law no. 217/2003 on Preventing and Fighting Domestic Violence, corroborated with provisions of

Articles 111 and 112, point g. of the Penal Code. In their motion, prosecutors asked the court to order a temporary safety measure against defendant M.T., who was under investigation for offences specified by Article 1, paragraph 1, point 1 of Law no. 61/1991 and by Article 193 of the Penal Code. In support of their motion, prosecutors invoked Article 33, point a. of the Penal Code, which prohibits the defendant from returning to the family home for a determined period of time.

File no. 9931/P/2004 of the Prosecutors' Office of the 7th Sector First Instance Court of Bucharest was attached to the notification.

At the first hearing, the court, upon review of the documents contained in the file, found these facts: on September 20, 2004, following an argument between M.M, the plaintiff, and her husband M.T., the defendant, regarding the payment of some debts, an altercation took place, during which the latter threatened M.M. to kill her, hit her and chased her out of the home. As a result, the plaintiff had to live with her son, since the defendant refused her access to the house.

On the evening of September 22, 2004, the defendant sharpened a large kitchen knife with a blade of approximately 22 cm, showed the knife to his daughter M.G., and told her that the next day he would wait for the plaintiff at her job, and attack her.

On the morning of September 23, 2004, the defendant took the knife and went to the plaintiff's workplace. When she noticed his presence, she called the police. Following a body search, law enforcement found the knife, hidden in a bag.

A criminal investigation was initiated against the defendant for committing offences as stipulated in Article 1, paragraph 1, point 1 of Law no. 61/1991 and Article 193 of the Penal Code, and consistent *with the application* of Article 33, point a. of the Penal Code.

Question:

In view of the facts of the case, as well as of the produced evidence, how should the court decide on the motion requesting a temporary safety measure in the first instance court? Please develop arguments in support of your answer.

CASE STUDY NO.III

DESCRIPTION:

Defendant Mariana has a 13 year old daughter, Alina, from a previous marriage. As of September 2003, Mariana began a common-law relationship with defendant Marcel, and they started to live together along with the defendant's daughter.

Approximately two months after this common-law relationship began, Marcel started to behave violently against Alina, slapping her several times and telling her that, from now on, he would have intercourse with her anytime he pleased. This took place in front of the minor's mother, Mariana, who did not react in any way. The defendant told Mariana to go to the bedroom, and then took Alina to the living room where he asked her to take off her clothes. Alina refused to do so but Marcel took her clothes off and had full sexual intercourse with her, against her will. As a result of repeated acts violence against her, Alina stopped offering any resistance, and the defendant continued to have sexual intercourse with her. The prosecutor, however, was unable to establish accurately the frequency of such intercourse.

In April 2004, Marcel was surprised by his own daughter, who was living with them for a short while, while he had sexual intercourse with Alina. As a rule, while the defendant had sexual intercourse with

the minor, her mother, defendant Mariana, was home but did not intervene. She just beat her daughter after each sexual encounter, accusing her of stealing her man.

For having forced sexual intercourse with Alina between December 2003 until April 2004, accompanied with violence and threats, defendant Marcel was sent to trial for committing the offence of repeated rape.

Since defendant Mariana, as Alina's legal guardian, tolerated the fact that Marcel had sexual intercourse with her daughter, without taking any steps to protect her or to secure a climate of morality in the home, and, through her conduct, seriously jeopardized Alina's physical, intellectual and moral development, she was sent to trial for bad treatments applied to a minor.

CHARACTERS:

Marcel
Mariana
Alina
A Judge

MARCEL

He is 45 years old, attended school through the 8th grade, is working with a commercial company, and does not have a criminal record. He was married previously, and has a daughter who lives with his former wife. At the time when the alleged crimes were committed, he lived in his common-law spouse's apartment. Marcel maintains that he is innocent, does not admit that he committed any crime, and claims that he got into this situation due to Alina's vengeful attitude, for she wants to hide the fact that she has begun to have sex with other boys.

MARIANA

She is a 38 years old housewife. She is divorced, and has a daughter (Alina) from a previous marriage. She believes that her daughter „is stealing her man”. She hates her and her common law spouse's cold behavior towards her is Alina's fault. She claims that Alina is a bad girl who entices Marcel to have sexual intercourse with her.

ALINA

She is 14 years old and a pupil in the 8th grade. She states that she is stressed out by what happened, is depressed and anxious; she claims that she suffers from abdominal pain, from lack of appetite, and from nightmares about the sexual abuse she has suffered. She has problems at school and wants to run away from home. Alina says that her mother should not be blamed at all for what happened. She says that her mother beats her just because she loves Marcel very much. .

ROLE PLAY

The judge will hear the minor for about 5/10 minutes.

The seminar room is arranged like a courtroom

4 main actors + 3-5 volunteers are necessary.

Main actors:

The judge (may be assisted by one-two judge colleagues, like in a court panel):

- may select two-three other seminar participants to consult with before and during the role play (a scene of the trial);
- may appoint other individuals to participate in the role play, such as defense counsels and/or prosecutors etc.

Alina – damaged party

Marcel – defendant

Mariana – defendant

Observers: other attendees

Seminar in BUCUREȘTI – April 2007 (prosecutors)

CASE STUDY NO. I

AB and AC are spouses who separated 2 years ago. AD, their 13 years old son, lives with his mother (AB).

On January 13, 2006, the father (AC) went to the school where his son is enrolled. He had a chat with his son's teacher, and found out that the child risked failing three courses. The father waited for the child to get out of school and, in front of his classmates, hit him and threatened to kill him should he fail those courses.

On January 14, 2006, AB filed a preliminary criminal complaint with the court, on behalf of and for minor AD, for the offences of „hitting” and „threatening”. She also sent a medical (forensic) certificate confirming that AD had injuries which required 7-8 days of medical care.

The prosecutor has conducted investigations in the case and, on March 2, 2006, through a public prosecutor's indictment, decided to send defendant AC to court for the offences mentioned in the preliminary complaint.

During the first hearing (April 1, 2006), the court heard the victim (minor AD) in the presence of his mother and of defendant AC. The defendant admitted that he had hit and threatened the minor, but said that this was a simple, necessary punishment because the child was not serious about school. The intention of the threat was to scare him into studying harder.

The court agreed to hear two witnesses to the incident, MN and SL, AD's school mates. MN testified during the first hearing. He stated that he was present when AC hit and threatened minor AD, and mentioned that he had witnessed numerous situations when minor AD was hit and threatened by his father, AC, in the schoolyard.

The case was adjourned in order to hear witness SL.

At the next hearing (May 03, 2006), the two spouses, AB and AC, appeared before the court, and the mother stated that she wanted to withdraw her criminal complaint. Minor AD told the court, however, that he disagreed with his mother, since his father had a violent behavior towards him, and he wanted to put an end to this situation.

Questions:

1. *What is your opinion about the public prosecutor's indictment? In your opinion, what is the cause of action?*
2. *How do you think the court session prosecutor should react to the fact that AB wants to withdraw her complaint?*
3. *What if AB had withdrawn her complaint during the criminal proceedings?*

CASE STUDY NO. II

-Part I-

AB and CD are common law spouses who have lived together for 12 years with TS, AB's son from a different relationship whom they raised together. TS is 13 years old, a minor.

On January 15, 2007, AB filed a criminal complaint with the police, stating that, three days before, both she and her son had been hit with a bat by CD, who had come home drunk. Mother and son went to the National Institute of Forensic Medicine for an expertise, and doctors prescribed 24-26 days of medical care for AB, and 22-24 days for TS.

According to the witnesses' depositions (PT and CN), common law spouses' neighbors, the relationships between the two had worsened in the past year because CD had begun to abuse alcohol frequently and created disturbances in the house. Neighbors had had to intervene on numerous occasions, and to take AB to the hospital.

The prosecutor initiated criminal proceedings for two concurrent offences, specified by Article 181, paragraph 1 (1) of the Penal Code, and asked the court to issue a temporary safety measure under Articles 26 and 27 of Law no. 217/2003 on Preventing and Fighting Domestic Violence, to prohibit the defendant from returning for a determined period of time to the shared household.

The first instance court rejected the request, on grounds that *procedural* requirements were not met, since AB, minor TS and CD were not related family members as defined by Article 149/1 of the Penal Code.

Questions:

1. *What is your opinion on the legality of the prosecutor's request for a temporary safety measure?*
2. *Is the court decision and its rationale consistent with the law? Please develop arguments in support of your answer.*

CASE STUDY NO. II

-Part II-

On September 23, 2004, a notification was filed with the First Instance Court of the 4th Sector in Bucharest by the Prosecutors' Office attached to this court under provisions of Articles 26 and 27 of Law no. 217/2003 on Preventing and Fighting Domestic Violence, corroborated with provisions of Articles 111 and 112, point g. of the Penal Code. In their motion, prosecutors asked the court to order a temporary safety measure against defendant M.T., who was under investigation for offences specified by Article 1, paragraph 1, point 1 of Law no. 61/1991 and by Article 193 of the Penal Code, and consistent with the application of Article 33, point a. of the Penal Code, to prohibit the defendant from returning to the family home for a determined period of time. File no. 0931/P/2004 of the Prosecutors' Office of the 4th Sector First Instance Court of Bucharest was attached to the notification.

At the first hearing, the court, upon review of the documents contained in the file, found these facts: on September 20, 2004, following an argument between M.M, the plaintiff, and her husband M.T., the defendant, regarding the payment of some debts, an altercation took place, during which the latter threatened M.M. to kill her, hit her and chased her out of the home. As a result, the plaintiff had to live with her son, since the defendant refused her access to the house.

On the evening of September 22, 2004, the defendant sharpened a large kitchen knife with a blade of approximately 22 cm, showed the knife to his daughter M.G., and told her that the next day he would wait for the plaintiff at her job, and attack her.

On the morning of September 23, 2004, the defendant took the knife and went to the plaintiff's workplace. When she noticed his presence, she called the police. Following a body search, law enforcement found the knife, hidden in a bag.

Criminal proceedings were initiated against the defendant for committing offences as stipulated in Article 1, paragraph 1, point 1 of Law no. 61/1991 and Article 193 of the Penal Code, and consistent *with the application* of Article 33, point a. of the Penal Code.

Question:

In view of the facts of the case, as well as of the produced evidence, do you think that the prosecutors notified the court in a legal and well-grounded manner? Please develop arguments in support of your answer.

Conclusions of the seminars

1. The first aspect discussed during the seminars was that of the scope of the „family member” concept, which is not **defined in a consistent way** by the legislation in force (the definition offered by the Penal Code is more restrictive than that given by Law no. 217/2003). More specifically, one hypothetical distributed to the participants addressed the cause of action in a case where a father beats up his underage son. The son lives with his mother, not with his father. The judges’ majority opinion was that, in the case, the son did not qualify as „family member” and the offence could not be sanctioned under Article 180, paragraph 2¹ of the Penal Code, because the more restrictive definition contained in Article 149¹ of the Penal Code prevails over that given by Article 3 of Law no. 217/2003. Prosecutors participating in a separate seminar reached the same conclusion.

On the question of applying Article 180, paragraph 2¹ of the Penal Code, some judges disagreed with the majority opinion, for differing reasons:

- Some participants in Iași and Timișoara concluded either that Article 3 of Law no. 217/2003 was applicable, or that Law no. 217/2003 implicitly amended the Penal Code.
- Some participants in Alba-Iulia concluded that family relations cannot be seen as severed just because family members no longer live together, and that the Penal Code makes an unjustified discrimination.
- In Ploiești, some participants resorted to an extensive interpretation both of the Penal Code and of Law no. 217/2003. They concluded that Law no. 217/2003 cannot expand provisions of the Penal Code, because it is not a special law; but they argued that Article 149 of the Penal Code extends the “family member” definition, whether these members cohabit or not.

Most of the participants agreed also that, *de lege ferenda*, de facto situations should be included in the scope of family relationships, provided that they are stable. However, opinions differed regarding the **necessity required by Law no. 217/2003 to establish the existence of a factual family relationship through a social investigation:**

- i) a social investigation is necessary and useful to provide evidence, and is the only method available to the court;
- ii) any evidence is admissible under de facto situations. Participants brought several arguments in support of this opinion: a social investigation is a slow procedure, which very seldom provides additional information useful to a case, and the de facto situation is, generally, of public notoriety. There were also additional arguments: the need to decide upon such requests in a speedy manner, the formalistic aspect of social investigations, and the jurisprudence of the European Court for Human Rights.

Also, the participants discussed the status of Law no. 217/2003: is it a special law which expands the Penal Code definitions? There were various minority opinions (e.g. that it is a civil law, a law containing penal provisions, or a penal law) but most of the participants agreed that this is a special ordinary law, which contains provisions of criminal nature (e.g., safety measures), but not a penal special law, since it does not regulate distinct offences. All the participants were in favor of repealing Article 149¹ and of revising the Penal Code, in such a way to expand the scope of the ‚family member’ concept. In support of this, they invoked the European Court for Human Rights’ jurisprudence in the area of Article 8 § 1 of the European Convention on Human Rights.

In the same context, the participants addressed the issue of **holding a criminal trial in situations where there is a contradiction between the interests of an underage victim and his/her legal representative**. One of the case studies presented a mother who wanted to withdraw a preliminary complaint filed by her for and on behalf of her son, who was a victim of his father's violent conduct. However, the son disagrees with his mother's withdrawing the complaint. Most participants opined that a criminal trial should follow (and, implicitly, a criminal action should be initiated in court). In support, they invoked the child's best interest and provisions of Law no. 272/2004, which gives an underage child the possibility to file a complaint him/herself. The prosecutors who participated in the April 2007 seminar also invoked and agreed with these conclusions.

2. A second issue addressed in the seminars was that of **safety measures set forth by Law no. 217/2003** and of how they should be applied. One of the case studies distributed to the participants refers to a motion introduced by the prosecutor, requesting that the court order a safety measure prohibiting the violent husband, who no longer lives or manages the household together with his wife and son, from returning to the family residence. All participants agreed that the request of ordering a safety measure is admissible in the case, and that the estranged husband qualifies as „*family member*” under Law 217/2003.

Moderators raised the question of the **efficiency of legal instruments**, with particular reference to the case – prohibiting the aggressor from returning to the family home. Participants unanimously agreed that the measure does not ensure effective protection to the victim, particularly since an aggressive behavior may take place outside the family home (in the case study, the aggressor was stalking the victim at her workplace) and the law does not sanction violation of such prohibition. They agreed that new concepts need to be introduced, which would ensure the protection of victims, such as restraining orders sanctioned by detention in case of violation.

In this context, another issue was raised in the judicial seminars: the possibility to order a measure **prohibiting the aggressor from returning to the family home even when he/she is the home owner**. Participants unanimously agreed that such a request can be accepted because the general interest to protect victims prevails over the individual interest of protecting property.

A. EVALUATION RESULTS132 judge participants¹³²**I. By using a scale from 1 to 5 (5=most useful, 1=useless), please answer the questions below:****1) How do you consider this seminar from the point of view of its organization?**

- 1- 0 participants**
- 2- 0 participants**
- 3- 0 participants**
- 4- 23 participants**
- 5- 101 participants**

Comments:

- a practical topic and an adequate theoretical and practical review; a good structure of the program; and an agenda drafted carefully, in order to obtain the expected results;
- very well organized; the fact that a small number of judges was invited allows for very good interactivity;
- impeccable organization, and the judge-moderators succeeded to reach the purpose of the seminar, showing professionalism, and preparing the materials, which were sent to the participants well in advance;
- I think that representatives from social assistance departments should attend such seminars, to tell us how they handle domestic violence cases (regarding both the victim and the aggressor);
- the first seminar day was too long. There was an attempt to address a series of issues/hypotheticals which required extended reflection, and the fact that they were addressed in one day was rather exhausting.

2) How do you consider the seminar from the point of view of the teaching method?

- 1- 0 participants**
- 2- 2 participants**
- 3- 1 participant**
- 4- 14 participants**
- 5- 109 participants**

Comments:

- the seminar format eliminates the usual stress of a professional seminar, offers freedom of thinking and expression, even when you are not very familiar with the theoretical part; interesting and ,different';
- both trainers observed the adult teaching rules, and the selected method allowed them to communicate their message in the most pleasant way possible; even though

¹³² Iași, Alba-Iulia, Timișoara, Brașov, Craiova and Ploiești.

they did not propose any solutions, they were capable of leading discussions successfully; they allowed us to relax, even though they had much information to share, knowing that they will succeed to do so;

- I think that the trainers should have provided their own opinions and arguments in the debated case studies;
- I cannot see the usefulness of the role play; the legal issues contained in the case study could have been discussed in any other way, and the participants in the little 'play' are not capable of playing their parts.

3) Do you think this seminar has been useful for your professional activity?

1- 0 participants

2- 0 participants

3- 2 participants

4- 28 participants

5- 96 participants

Comments:

- very useful, particularly since I handle domestic violence cases, and must apply provisions of Laws no. 217/2003 and 211/2004;
- yes, because, in their work, judges have the responsibility of sanctioning and preventing domestic violence;
- yes, especially to me, a judge in a small court, where the professional dialog is somehow limited;
- the selected topic is useful to our work, because this exchange of experience with other judges results in adopting a consistent practice and methodology;
- final conclusions were not reached, and the discussions remained just opinions, more or less reasoned;
- yes, but the cases I meet in practice are rather limited.

4) How useful do you think the group discussions have been?

1- 0 participants

2- 2 participants

3- 0 participants

4- 25 participants

5- 99 participants

Comments:

- extremely useful, because they clarified aspects of consistent application of the law;
- group discussions were useful because they gave me the opportunity to learn how my judge peers addressed the issues subjected to debates;
- sometimes, they were rather animated, but very exciting and interesting;
- I think that the cases study was too somber given the offence selected for the role play.

II. On a scale from 1 to 5 (5=most useful, 1=useless), please evaluate the following statements:

1) The seminar moderators (trainers) succeeded to maintain the participants' motivation at a high level:

- 1- 2 participants
- 2- 2 participants
- 3- 1 participant
- 4- 18 participants
- 5- 104 participants

2) All the tasks were clearly explained:

- 1- 4 participants
- 2- 0 participants
- 3- 2 participants
- 4- 21 participants
- 5- 102 participants

3) Communication with the moderators was good during the seminar:

- 1- 2 participants
- 2- 1 participant
- 3- 1 participant
- 4- 11 participants
- 5- 112 participants

4) Would you prefer a more interactive seminar?

- 1- 68 participants
- 2- 19 participants
- 3- 16 participants
- 4- 6 participants
- 5- 5 participants

III. Please, answer YES or NO the questions below:

1) I consider the seminar was extremely interesting and useful:

- YES- 124 participants
- NO – 2 participants

2) I will use the information acquired during the seminar in performing my professional duties:

- YES - 124 participants
- NO – 1 participant

3) Do you think that the legal framework on preventing and fighting domestic violence should be improved?

YES - 124 participants

NO – 2 participants

Please, develop arguments in support of your answer:

- the Penal Code should be amended in order to correlate with provisions contained by the special laws in force; a system of institutions and local administration bodies with responsibilities in this area should be established in such a way to avoid overlaps, and to be clear both to victims and institutions about when, how, who and in what terms they can resort to and benefit from legal protection; the legislator should merge Law no. 272/2004 and Law no. 217/2003 into a single law, which would regulate both issues, since the areas of the two laws are closely related; strength and efficiency of legal norms does not lie in their number but, on the contrary, in their accessibility, both for beneficiaries and for law practitioners;
- first of all, in case of violence offences against family members, judicial authorities' intervention should not be conditioned by a preliminary complaint or halted if there was reconciliation; they should be offered the possibility to act ex officio;
- the new Penal Code and Criminal Procedures Code should be adopted in correlation with the special laws in force; the overcrowded institutional framework should be eliminated, and precise prerogatives should be established for all the institutions involved;
- Law no. 217/2003 does not contain express provisions to guide effective judicial procedure (with reference to Articles 26, 27 and 28); ordering temporary measures is justified even in the absence of criminal provisions (in the absence of a criminal trial, in which criminal proceedings have already been initiated, for a domestic violence act);
- I think that the legal framework in the area should be improved by correlating the Penal Code, the Criminal Procedures Code, the Civil Code, the Civil Procedures Code and the Family Code; the laws to be adopted in the area need to be clear, in order to effectively help victims of domestic violence;
- because legal provisions leave room for diverging interpretations, do not cover multiple situations, have flaws, adequate new legal concepts should be introduced, and should even be based on a comparative study;
- since general departments for social assistance and child protection have most of the responsibilities in the area of child protection, Law no. 272/2004 should be amended, in order to grant a legal prerogative to such institutions to notify judicial authorities, to order any steps specified by law, when such steps are in a minor child's best interest;
- current legislation does not cover all of the issues that surface in the area of domestic violence and, even where issues are regulated, these regulations cannot be applied due to a lack of correlation among the relevant legislation;

Law no. 217/2003 does not cover all the situations faced by practitioners, is incomplete, and contains ambiguous provisions. The final conclusion is that a new law is necessary in the area, which would be based on similar legislation of countries with a long experience in the area and which have been successful in fighting and preventing domestic violence.

B. EVALUATION RESULTS

16 prosecutor participants¹³³

I. I. By using a scale from 1 to 5 (5=most useful, 1=useless), please answer the questions below:

1) How do you consider this seminar from the point of view of its organization?

- 1- 0 participants
- 2- 0 participants
- 3- 0 participants
- 4- 1 participant
- 5- 15 participants

Comments:

- very well organized, in all aspects - 2 participants;
- impeccable – 1 participant.

2) How do you consider the seminar from the point of view of the teaching method?

- 1- 0 participants
- 2- 0 participants
- 3- 0 participants
- 4- 2 participants
- 5- 14 participants

Comments:

- the teaching method was different from those with which we are familiar (lecture/type), much more interesting, and maintains attention constantly, with no dull moments – 1 participant;
- a very good teaching method because it allows for free discussions – 1 participant;
- it gives the participants the opportunity to express their own opinions and to participate in the debates – 1 participant;
- an interactive and efficient method – 1 participant;
- I highly appreciated the interactive character of the seminar – 1 participant;
- useful, due to the presented case studies – 1 participant.

3) Do you think this seminar has been useful for your professional activity?

- 1- 0 participants
- 2- 0 participants
- 3- 0 participants
- 4- 3 participants
- 5- 13 participants

¹³³ Bucharest.

Comments:

- yes, provided that a better collaboration develop between institutions with the power to fight this phenomenon – 1 participant;
- its usefulness results from the seriousness of this phenomenon and the paucity of attention paid to it in practice – 1 participant;
- useful, due to the new information we acquired and to the fact that some issues have been clarified – 1 participant;
- useful, to the extent that I will handle domestic violence cases – 1 participant;
- it is very useful, because it makes me act in situations other than those I had to act so far – 1 participant;
- yes, it is useful for practical activities, taking into account the cases we are handling – 1 participant.

4) How useful do you think the group discussions have been?

- 1- 0 participants**
- 2- 0 participants**
- 3- 1 participant**
- 4- 1 participant**
- 5- 14 participants**

Comments:

- very open, which allowed us to learn from the experiences of our colleagues – 1 participant;
- unfortunately, I was in a group which was not very homogenous – 1 participant;

II. On a scale from 1 to 5 (5=most useful, 1=useless), please evaluate the following statements:

1) The seminar moderators (trainers) succeeded to maintain the participants' motivation at a high level:

- 1- 0 participants**
- 2- 0 participants**
- 3- 0 participants**
- 4- 2 participants**
- 5- 14 participants**

2) All the tasks were clearly explained:

- 1- 0 participants**
- 2- 0 participants**
- 3- 0 participants**
- 4- 1 participant**
- 5- 15 participants**

3) Communication with the moderators was good during the seminar:

- 1- 0 participants
- 2- 0 participants
- 3- 0 participants
- 4- 1 participant
- 5- 15 participants

4) Would you prefer a more interactive seminar?

- 1- 11 participants
- 2- 3 participants
- 3- 0 participants
- 4- 2 participants
- 5- 0 participants

III. Please, answer YES or NO the questions below:**1) I consider the seminar was extremely interesting and useful:**

- YES - 16 participants
- NO – 0 participants

2) I will use the information acquired during the seminar in performing my professional duties:

- YES - 16 participants
- NO – 0 participants

3) Do you think that the legal framework on preventing and fighting domestic violence should be improved?

- YES - 16 participants
- NO – 0 participants

Please, develop arguments in support of your answer:

- regulations need to be clearer, provisions of the special laws need to be correlated with the Penal Code and the Code of Criminal Procedures, in such a way that it eliminates multiple interpretations or those that make these provisions inapplicable;
- arguments have been presented also while discussing the case studies in the seminar; unfortunately, the Romanian legislation in this area still has many flaws;
- bad laws result in the fact that persons subjected to domestic violence remain without protection;
- there is a blatant difference between the two codes (the Penal Code and the Code of Criminal Procedures) and Law no. 217/2003.

For this reason, some of the text is in outline form (see in particular Chapter VI), or unchanged from the previous law (see Chapter VII – social services). Please note, on the other hand, that in Chapter VI we modified some of the current law language to make it more rigorous.

Further, we wish to bring to your attention to Article **XX** (*in italics*) under Chapter **XX**. Many stakeholders recommend that the act of committing acts of domestic violence (as defined in the draft language) should become a crime in itself. However, we believe that this issue belongs to the competence of those in charge of defining national penal policy for Romania. Therefore, we have not fully developed the article, but rather highlighted what it might contain. Please note as well that minor comments within the draft language are similarly in italics.

As to comments from the National Coalition, we wish to mention with no disrespect that: 1) The need to rewrite the language of law No. 217/2003 stems from the consensus of all magistrates CEELI has consulted with (two working groups and three seminars around the country) that the law as currently written is inapplicable technically – an issue that non-magistrates may not be fully cognizant about.

2) As noted above, CEELI refrained from altering or expanding upon institutional structures or recommending new institutions, for it believes that such should reflect the input from the ministry, the national agency, and the national coalition; without comments throughout the legislative development process, CEELI was not in a position to draft such language. And,

3) The proposed language includes both civil and penal restraining orders.

We hope that this draft will meet your expectations for a more rigorous and clearer law, and look forward to hearing about the next steps you will propose to take. In the meantime, please feel free to call me or my colleagues if you need further information.

Respectfully,

Madeleine Crohn
Country Director
ABA-CEELI Romania

CC: National Agency for Protection of Family. – attention to Ms. President Mihaela Mostavi
National Coalition on Domestic Violence (c/o GRADO) – attention to Ms. Rodica Niță
The Ministry of Justice – attention to State Secretary Ion Codescu
John Snow International – attention to Dr. Cornelia Maior
USAID – attention to Ms. Ruxandra Datcu

Lege privind violența în familie

Proiect

Capitolul I

Dispoziții generale

Art. 1

(1) Prezenta lege reglementează cadrul legal și instituțional privind prevenirea și combaterea violenței în familie.

(2) Aplicarea dispozițiilor acestei legi nu exclude răspunderea civilă, penală sau contravențională a agresorului stabilită potrivit altor acte normative în vigoare.

(3) De dispozițiile prezentei legi beneficiază:

- a) cetățenii români aflați pe teritoriul României;
- b) cetățenii străni și apatrizii aflați pe teritoriul României;
- c) persoanele care solicită sau beneficiază de statutul de refugiați pe teritoriul României, în condițiile reglementărilor privind statutul refugiaților.

Art. 2

În sensul prezentei legi, termenii și expresiile de mai jos au următoarele semnificații:

a) ‘membru de familie’ - orice persoana membru al familiei biologice, legale sau de fapt sau care locuiește împreună cu făptuitorul și cu care a stabilit relații de încredere, îngrijire sau dependență, de exemplu: soț sau fost soț; partener în uniune consensuală (concubin); rudele până la gradul IV inclusiv; tutore sau altă persoană care exercită de drept sau în fapt drepturile față de persoana copilului; reprezentant legal sau altă persoană care îngrijeste persoana cu boală psihică, dizabilitate intelectuală sau handicap fizic, cu excepția celor care îndeplinesc aceste atribuții în exercitarea sarcinilor profesionale; soțul adoptatorului sau al părintelui firesc.

b) ‘violența în familie’ - orice acțiune fizică sau verbală săvârșită de către un membru de familie împotriva altui membru al aceleiași familii, care are ca rezultat sau poate avea ca rezultat o vătămare sau o suferință fizică, psihică sau sexuală sau un prejudiciu material. Violența în familie include și împiedicarea victimei de a-și exercita drepturile fundamentale, inclusiv cele civile și economice, precum și acțiuni în legătură cu viața de familie care provoacă sau pot provoca victimei un prejudiciu moral sau material.

c) ‘victima violenței în familie’ - un membru al familiei expus violenței în familie.

d) ‘agresor’ - orice persoana care a săvârșit sau cu privire la care există indicii temeinice că a săvârșit

acte de violență în familie.

Art. 3

(1) Protecția și promovarea drepturilor victimelor violenței în familie se realizează în conformitate cu următoarele principii:

- a) principiul **legalității** constă în respectarea prevederilor Constituției și legislației naționale în materie, precum și a prevederilor specifice din tratatele internaționale la care România este parte;
- b) principiul **universalității**, potrivit căruia fiecare persoană are dreptul la măsuri de prevenire, protecție și îngrijire în condițiile prevăzute de lege;
- c) principiul **respectării demnității umane**, potrivit căruia fiecărei persoane îi este garantată dezvoltarea liberă și deplină a personalității;
- d) principiul **celerității** în instrumentarea cazurilor de violență în familie;
- e) principiul **prevenirii** săvârșirii actelor de violență în familie, conform căruia preidentificarea și înlăturarea în timp util a cauzelor apariției actelor de violență în familie sunt prioritare și imperative;
- f) principiul **parteneriatului**, potrivit căruia autoritățile administrației publice centrale și locale, instituțiile de drept public și privat, structurile asociative, precum și instituțiile de cult recunoscute de lege cooperează în vederea asigurării protecției și acordarea serviciilor sociale specializate victimelor violenței în familie;
- g) principiul **confidențialității**, conform căruia, atât în calitate de membri ai comunității, cât și de beneficiari ai serviciilor sociale în domeniul violenței în familie, victimelor violenței în familie trebuie să li se recunoască dreptul la respectarea și aplicarea măsurilor de securitate pentru protecția datelor cu caracter personal și utilizarea acestora cu consimțământul victimei; reprezentanții autorităților publice, ai mass-mediei, și personalul specializat în domeniu trebuie să respecte regimul prelucrării și evidenței acestor date și să le utilizeze în interesul acestora, în condițiile legii, fără a aduce nici un fel de prejudiciu drepturilor sau demnității lor;
- h) principiul **subsidiarității**, potrivit căruia, în situația în care persoana sau familia nu își poate asigura integral nevoile în rezolvarea cazurilor de violență în familie, intervin colectivitatea locală, structurile ei asociative și, complementar, statul;
- i) principiul **nediscriminării**, potrivit căruia accesul la serviciile de asistență socială destinate victimelor violenței în familie se realizează fără restricție sau preferință de rasă, naționalitate, origine etnică, limbă, religie, categorie socială, opinie, sex ori orientare sexuală, vârstă, apartenență politică, dizabilitate, boală cronică necontagioasă, infectare HIV sau sau includere într-o categorie defavorizată, precum și orice alt criteriu care are ca scop ori ca efect

restrângerea folosinței sau exercitării, în condiții de egalitate, a drepturilor omului și a libertăților fundamentale.

- j) principiul **egalității de șanse și de tratament între femei și bărbați** constă în luarea în considerare a capacităților, nevoilor și aspirațiilor diferite ale persoanelor de sex masculin și, respectiv, feminin și tratamentul egal al acestora, având în vedere respectarea și promovarea drepturilor persoanelor afectate de violența în familie.

Art. 4

- (1) Victima violenței în familie are dreptul la respectarea personalității, demnității și a vieții sale private.
- (2) Victima violenței în familie are dreptul la protecție specială, adecvată situației și nevoilor sale.
- (3) Victimele violentei în familie beneficiaza de asistență judiciară gratuită, în condițiile legii.
- (4) Victimele violentei în familie beneficiaza de servicii de consiliere, reabilitare reintegrare, precum și de asistență medicală gratuită, în condițiile prezentei legi.

Art. 5

- (1) Victima violenței în familie are dreptul să fie informată cu privire la exercitarea drepturilor sale.
- (2) Judecătorii, în cazul în care victima se adresează direct instanței pentru protecția drepturilor sale, procurorii, ofițerii și agenții de poliție, reprezentanții DGASPC, reprezentanții compartimentului cu atribuții în combaterea violenței în familie și orice funcționar care în exercitarea activității lor profesionale sau de serviciu iau cunoștință de existența cazurilor de violență în familie au obligația să informeze victima cu privire la exercitarea drepturilor sale și serviciile specializate cărora li se poate adresa.

Art. 6

- (1) Statul român, prin autoritățile competente, elaborează și implementează politici și programe sociale destinate prevenirii și combaterii violenței în familie. precum și protecției victimelor violenței în familie.
- (2) Autoritățile administrației publice centrale și locale au obligația de a aplica măsuri și a promova acțiuni de prevenire și combatere a violenței în familie și de a asigura protecția drepturilor sale.

Capitolul II

Protecția victimelor violenței în familie prin mijloace de drept privat

Art. 7

- (1) Victima violenței în familie are dreptul să se adreseze instanței judecătorești pentru ca aceasta să interzică, prin ordonanță președințială, rămânerea sau revenirea agresorului în locuința comună,

dispunând și, după caz, evacuarea acestuia.

(2) Prin aceeași hotărâre instanța poate dispune și următoarele măsuri :

- a) să oblige pe agresor să acopere anumite costuri care sunt suportate sau vor fi în mod cert suportate de victimă, ca de exemplu cheltuieli medicale, cheltuieli de judecată și executare.
- b) să ia măsuri vremelnice cu privire la încredințarea copiilor minori, obligația de întreținere și prestațiile sociale. Prevederile art. 42 alin 2 și 3 din Codul Familiei se aplică corespunzător.

(3) Cererile prevăzute la alin. 1 sunt scutite de taxa de timbru.

(4) Prin aceeași hotărâre instanța se poate pronunța și asupra cheltuielilor prevăzute la art. 27 din prezenta lege.

Art. 8

(1) Cu privire la victima minoră a violenței în familie se pot lua măsurile de protecție specială prevăzute de Legea 272/2004.

(2) Dacă instanța sesizată cu judecarea cererii prevăzute la art. 7 constată existența uneia dintre situațiile care necesită instituirea unei măsuri de protecție specială a copilului, va încunostiința de îndată DGASPC.

Art. 9

(1) Victima violenței în familie are dreptul să depună cererea prevăzută la art. 7, indiferent dacă are sau nu capacitate de exercițiu. Dispozițiile art. 44 Cod procedură civilă se aplică corespunzător. Instanța va solicita, după caz, DGASPC să desemneze de îndată persoana care va fi numită de instanță curator special.

(2) Cererea prevăzută la art. 7 poate fi introdusă în numele victimei și de:

- a) procuror, în condițiile art. 45 din Codul de Procedură Civilă;
- b) reprezentantul legal al copilului sau incapabilului;
- c) reprezentantul Direcției Generale de Asistență Socială și Protecția Copilului ;
- d) reprezentantul compartimentului cu atribuții în combaterea violenței în familie ;
- e) reprezentantul organismelor private acreditate, cu acordul victimei;

(3) În cazurile prevăzute la alin. 2 se aplică în mod corespunzător dispozițiile art. 45 alin 2 din Codul de procedură civilă.

Art. 10

(1) Cererile se judecă de urgență, cu citarea, după caz, a Direcției generale de asistență socială și protecția copilului, a reprezentantului compartimentului cu atribuții în combaterea violenței în familie și cu participarea procurorului.

(2) Cererea se judecă în camera de consiliu, fără citarea părților.

(3) Instanța este obligată să se pronunțe în cel mult 7 zile de la primirea cererii.

Art. 11

(1) Hotărârea instanței de fond este definitivă și executorie.

(2) Împotriva acesteia se poate introduce recurs în termen de 5 zile de la data comunicării hotărârii.

(3) Recursul nu suspendă executarea.

Art. 12

Dispozițiile prezentului capitol se completează corespunzător cu art. 581-582 din Codul de procedură civilă.

Art. 13

Cererile prevăzute la art. 7 sunt de competența instanțelor specializate pentru minori și familie de la domiciliul sau reședința în fapt a victimei violenței în familie sau sediul persoanelor prevăzute la art. 9 alin (1) și (2).

Art. 14

(1) Hotărârea prin care se impune măsura prevăzută la art. 7 alin (1) din prezenta lege se comunică de îndată și organului de poliție în a cărei rază teritorială se află locuința comună a victimei și a agresorului.

(2) Organele de poliție au obligația de a asigura executarea măsurii în termen de 24 de ore de la comunicare, putând în acest scop pătrunde în locuință chiar fără învoirea persoanei față de care s-a luat măsura și a îndeplini orice acte care se impun, în condițiile legii.

(3) Organele de poliție au îndatorirea să supravegheze respectarea hotărârii și să sesizeze organul de urmărire penală în caz de sustragere de la executarea hotărârii, luând și orice măsură care se impune de urgență.

Capitolul III

Măsuri speciale de siguranță

Art. 15

(1) În cazul în care s-a început urmărirea penală sau s-a pornit acțiunea penală pentru o faptă care întrunește elementele constitutive ale violenței în familie, instanța de judecată, la cererea procurorului, a victimei sau din oficiu, ori de câte ori exista probe sau indicii privind existența unei stări de pericol pentru victimă, poate lua față de învinuit una sau mai multe din următoarele măsuri speciale de siguranță:

- a) obligarea la urmarea unor programe speciale de reabilitare;
- b) interdicția de a rămâne sau reveni în locuința familiei pe o perioadă determinată;
- c) interdicția de a se apropia de locuința, locul de muncă, școala sau alte locuri unde victima desfășoară activități sociale, indicate de către victimă, în condițiile stabilite de instanța de judecată.
- d) interdicția de a contacta victima în orice mod, direct sau indirect.

(2) Față de învinuit sau inculpat instanța poate lua și una din măsurile prevăzute de art. 113 și 114 din Codul Penal, în condițiile legii.

(3) În cursul urmăririi penale, instanța competentă cu luarea măsurilor prevăzute de alin 1 și 2 este instanța competentă să judece cauza în fond.

(4) Disponerea măsurilor de siguranță nu împiedică victima să se adreseze instanței civile pentru ca aceasta să dispună măsurile prevăzute de art. 7. Dispozițiile art. 9 se aplică în mod corespunzător.

Art. 16

(1) Organul de cercetare penală sesizat cu privire la o faptă care întrunește elementele constitutive ale violenței în familie, va cerceta de îndată dacă se impune luarea vreuneia din măsurile prevăzute la art.15, și, în caz afirmativ, va înainta un referat motivat procurorului competent.

(2) Procurorul, la sesizarea organului de cercetare penală sau din oficiu, dacă apreciază că sunt întrunite condițiile prevăzute de art. 15, va sesiza instanța competentă în termen de maximum 24 de ore.

(3) Primind dosarul, judecătorul fixează de îndată ziua și ora de soluționare a cererii, instanța fiind obligată să se pronunțe în termen de 3 zile de la primirea acesteia.

Art. 17

Cererea privind luarea măsurilor prevăzute de art. 15, introdusă în timpul judecății, va fi soluționată de instanță în termen de maxim 24 de ore.

Art. 18

(1) Asupra luării măsurilor prevăzute la art. 15 din prezenta lege instanța se pronunță prin încheiere motivată, dată cu citarea părților. Participarea procurorului este obligatorie. Neprezentarea părților, dacă au fost legal citate, nu împiedică judecarea cererii.

(2) Asistența juridică a persoanei față de care se ia măsura este obligatorie.

(3) Împotriva încheierii prevăzute la alin 1 se poate face recurs în termen de 3 zile de la pronunțare pentru părțile prezente sau procuror, sau de la comunicare pentru partea lipsă. Recursul nu este suspensiv de executare.

Art. 19

- (1) Persoana cu privire la care s-a luat una din măsurile prevăzute la art. 15 poate cere oricând revocarea măsurii, dacă au încetat temeiurile care au impus luarea acesteia.
- (2) Prevederile art. 24 se aplică corespunzător.
- (3) Recursul împotriva încheierii prin care s-a dispus revocarea măsurii este suspensiv de executare.

Art. 20

- (1) În cazul măsurii prevăzute de art. 15 alin 1 (b), partea vătămata sau procurorul pot solicita prelungirea acesteia, dacă se mențin temeiurile care au determinat luarea măsurii. Instanța poate decide prelungirea din oficiu a măsurii.
- (2) Prevederile art. 18 și 19 din prezenta lege se aplică corespunzător.

Art. 21

- (1) În vederea punerii în executare a măsurilor prevăzute de art. 15, instanța comunică copii ale încheierii definitive organelor de poliție în a căror rază teritorială se află locuința comună sau reședința persoanei vătămate și a persoanei față de care s-a luat măsura.
- (2) Organul de poliție are obligația să asigure executarea măsurilor prevăzute la alin (1) prin supravegherea respectării acestora și să sesizeze de îndată organul de urmărire penală în caz de sustragere sau nerespectare a măsurii.
- (3) În cazul luării măsurilor prevăzute de art. 15 alin 1 (b) și (c), pentru a asigura punerea în executare a măsurii, organul de poliție poate pătrunde în locuința sau sediul oricărei persoane fizice sau juridice, chiar fără acordul acesteia și a lua toate măsurile care se impun de urgență, în condițiile legii. În cazul nerespectării dispozițiilor organului de poliție, acesta este îndreptățit să folosească forța.

Capitolul IV**Dispoziții procedurale comune****Art. 22**

- (1) Pe durata procedurilor judiciare prevăzute de Capitolele II și III din prezenta lege, organele judiciare sunt obligate să ia toate măsurile, din oficiu, la cererea victimei violenței în familie sau a oricărei din persoanele prevăzute la art. 9 alin. (2), pentru a asigura confidențialitatea adresei la care se află victima.
- (2) Dacă victima sau victimele violenței în familie sunt găzduite într-un adăpost sau alt centru specializat, orice act procedural se va comunica sau efectua la adresa sediului persoanei juridice care administrează centrul sau la altă adresă indicată.
- (3) Obligația prevăzută la alin. (1) revine și oricărei persoane fizice sau juridice care în exercitarea

activității sale profesionale sau de serviciu ia cunoștință de existența cazului de violență în familie.

Art. 23

Pe durata procedurilor judiciare prevăzute de Capitolele II și III din prezenta lege, organele de poliție vor asigura protecția victimei violenței în familie la solicitarea acesteia sau a oricăreia din persoanele prevăzute la art. 9 alin (2).

Art. 24

(1) Dovada violenței în familie se poate face cu orice mijloc de probă, inclusiv cu acte medicale emise de un medic autorizat.

(2) Instanța poate să ceară informații de la orice persoana fizică sau juridică, publică sau privată, care deține informații cu privire la existența faptei, situația victimei sau a agresorului. Cei de la care s-au solicitat informații trebuie să răspundă de îndată, sub sancțiunea amenzii.

Art. 25

(1) Mărturia victimei violenței în familie se va administra prin mijloace tehnice audio-video, la solicitarea acesteia, a organului de urmărire penală sau a oricăreia din persoanele menționate la art. 9 alin (2).

(2) Prevederile art. 86² din Codul de Procedură Penală se aplică corespunzător.

Art. 26

(1) Taxele pentru eliberarea certificatelor medico-legale, pentru victimele vădit lipsite de mijloacele materiale necesare, se suportă de la bugetul local sau al DTMSS, pe baza referatului de decont întocmit de către unitatea de medicină legală.

(2) Autoritățile locale sunt obligate să întreprindă demersurile necesare aplicării acestei prevederi.

Art.27

Organismele private sau publice care administrează adăposturi pentru victimele violenței în familie vor putea solicita obligarea agresorului la plata cheltuielilor generate de adăpostirea și asistența victimei.

Capitolul V

Răspunderea penală și contravențională

Art. 28

(1) Actele repetate de violență în familie, săvârșite cu intenție, care produc unui membru al familiei o vătămare sau o suferință fizică, psihică sau sexuală sau un prejudiciu material sau moral, reprezintă infracțiune

pedepsită cu închisoare de la 1 an la 3 ani sau cu amendă, cu excepția faptelor incriminate separat de către Codul Penal sau alte legi speciale și pentru care se prevede o pedeapsă mai aspră.

(2) Nerespectarea hotărârii instanței prin care se iau măsurile prevăzute la art. 8 constituie infracțiune și se pedepsește cu închisoare de la 1 la 5 ani.

(3) Nerespectarea măsurilor de siguranță luate de către instanță în temeiul art. 15 constituie infracțiune și se pedepsește cu închisoare de la 2 la 5 ani.

(4) În cazul infracțiunilor prevăzute în prezentul articol, urmărirea penală se efectuează obligatoriu de către procuror.

(5) Judecătoria este instanța competentă pentru soluționarea cauzelor privind infracțiunile speciale prevăzute de prezentul articol, cu excepția cazurilor în care infracțiunea a fost săvârșită în raza de competență teritorială a tribunalelor specializate pentru minori și familie sau este de competența unei instanțe superioare, conform Codului de procedură penală.

Art. 29

(1) Organele de poliție sesizate sau care au indicii cu privire la posibila săvârșire a unei fapte de violență în familie au dreptul de a pătrunde în locuința sau sediul oricărei persoane fizice sau juridice, chiar fără acordul acesteia și a lua toate măsurile care se impun de urgență, în condițiile legii.

(2) În cazul nerespectării dispozițiilor organului de poliție, acesta este îndreptățit să folosească forța.

(3) Dacă sunt indicii cu privire la existența violenței în familie, de natură să pună în pericol iminent viața, integritatea fizică sau psihică a unui membru de familie, organul de poliție va proceda de îndată la reținerea făptuitorului și conducerea sa la cea mai apropiată secție de poliție.

(4) Dispozițiile Titlului IV, Capitolul I din Codul de Procedură Penală se aplică corespunzător.

Art. 30

La cererea instanțelor de judecată, Serviciile de protecție a victimelor și reintegrare socială a infractorilor întocmesc referatul de evaluare cu privire la inculpatul trimis în judecată pentru săvârșirea unei infracțiuni care întrunește elementele constitutive ale violenței în familie.

Art. 31

(1) În cazul aplicării unei pedepse cu suspendare sub supraveghere pentru o infracțiune care întrunește elementele constitutive ale violenței în familie, instanța poate obliga pe condamnat să urmeze un program specializat de consiliere și reabilitare.

(2) În cazul în care făptuitorul a urmat sau urmează deja un asemenea program, la recomandarea SPVRSI, instanța, dacă sunt îndeplinite condițiile legii, poate renunța la pedeapsă sau amâna aplicarea pedepsei.

Art. 32

(1) Săvârșirea uneia din contravențiile prevăzute de art. 2 din Legea 61/1991, republicată, cu modificările și completările ulterioare, asupra unui membru de familie sau dacă produce efecte asupra unui membru de familie se sancționează cu dublul amenzii prevăzute de lege.

(2) Sancțiunea amenzii poate fi înlocuită, cu acordul contravenientului, cu obligația de se prezenta la centrul de consiliere pentru agresori în termen de 48 de ore de la constatarea contravenției.

(3) Organul care constată săvârșirea contravenției va pune în vedere contravenientului posibilitatea înlocuirii sancțiunii amenzii, și în cazul în care acesta își dă acordul, i va pune în vedere să se prezinte la Centru. Dovada prezentării la Centru va fi depusă la organul care a constatat contravenția în termen de 7 zile lucrătoare.

Art. 33

(1) Constituie contravenție și se sancționează cu amendă de la 200 la 100 RON următoarele :

- a) Nedeseemnarea de îndată a curatorului special, la solicitarea instanței, în cazul prevăzut de art. 9 alin. (1);
- b) Nerespectarea obligației de confidențialitate prevăzută la art. 22 alin. (1) și (2).
- c) Nerespectarea obligației prevăzute la art. 23 din prezenta lege ;
- d) Necomunicarea de către persoanele fizice sau juridice de îndată a informațiilor solicitate potrivit art. 24 art. (2) ;

(2) Contravențiile prevăzută la alin. (1) pct. a) și d) vor fi constatate și sancționate de către instanța de judecată.

(3) Faptele prevăzute la alin. (1) vor atrage și răspunderea disciplinară a persoanelor responsabile.

Capitolul VI

Medierea/ Modalități alternative de soluționare a conflictelor

Art. 34

(1) Medierea reprezintă o modalitate facultativă de soluționare a conflictelor pe cale amiabilă, cu ajutorul unei terțe persoane specializate în calitate de mediator, în condiții de neutralitate, imparțialitate și confidențialitate.

(2) Cazurile de violență în familie pot fi supuse medierii la cererea părților, în condițiile prevăzute de Legea 229/2005. Persoanele cu atribuții în instrumentarea unui caz de violență în familie vor informa părțile cu privire la această posibilitate și modul de exercitare a acestui drept.

Capitolul VII

Cadrul instituțional

Art. 35

Agenția Națională pentru Protecția Familiei

Art. 36

Structuri locale

Art. 37

(1) Toate organele administrației publice locale sau centrale, care au atribuții în domeniul prevenirii și combaterii violenței în familie sau a protecției și asistenței victimelor, vor desemna și pregăti personal specializat pentru aceasta.

(2) Personalul specializat va beneficia de pregătire inițială și continuă în domeniul prevenirii și combaterii violenței domestice.

(3) Agenția Națională pentru Protecția Familiei asigură coordonarea acestei activități de pregătire profesională.

Art. 38

(1) Orice funcționar sau cadru medical care ia cunoștință, în desfășurarea activității sale de serviciu sau profesionale de existența cazurilor de violență în familie, va încunoștința de îndată autoritățile competente despre aceasta.

(2) Informarea autorităților competente cu privire la existența cazurilor de violență în familie nu reprezintă încălcare a secretului profesional.

Art. 39

La nivel local, reprezentanții instituțiilor și organismelor private acreditate cu rol în domeniul prevenirii violenței în familie și asistării victimei vor iniția structuri colaborative efective în vederea prevenirii și combaterii violenței în familie.

Art. 40

Raportarea statistică

Capitolul VIII

Unități și servicii de asistență socială

Art. 41

(1) Centrele pentru adăpostirea victimelor violenței în familie, denumite în continuare adăposturi, sunt unități de asistență socială, cu sau fără personalitate juridică, care asigură protecție, găzduire, îngrijire și consiliere victimelor violenței în familie.

(2) Primirea victimelor în adăpost se face în caz de urgență sau la recomandarea asistentului familial, a poliției, reprezentantului DTMSS, atunci când apreciază că aceasta se impune ca măsură de protecție și asistență.

(3) Persoanelor care au comis actul de agresiune le este interzis accesul în incinta adăpostului unde se găsesc victimele.

(4) Izolarea de agresori a victimelor se face cu consimțământul acestora sau, după caz, al reprezentantului legal.

(5) Corpurile gardienilor publici înființate pe lângă consiliile județene și Consiliul General al Municipiului București asigură paza adăposturilor publice sau private din zona de competență.

(6) Ministerul Administrației și Internelor, prin unitățile de poliție, va sprijini corpurile gardienilor publici pentru exercitarea atribuțiilor ce le revin, în condițiile prevăzute de lege.

Art. 42

Adăposturile pot fi publice, private sau în parteneriat public-privat și se înființează numai cu avizul ANPF. Metodologia de avizare, acreditare și standardele minime de calitate vor fi aprobate prin hotărâre de guvern.

Art. 43

(1) Adăposturile publice vor fi înființate prin hotărâre a consiliului județean sau local.

(2) Finanțarea adăposturilor publice se asigură din bugetele locale.

(3) Adăposturile publice vor asigura gratuit, pe o perioadă determinată, asistență familială atât victimei, cât și minorilor aflați în îngrijirea acesteia, protecție împotriva agresorului, îngrijire medicală, hrană, cazare, asistență psihologică și consiliere juridică, potrivit instrucțiunilor de organizare și funcționare. Tipurile de servicii și condițiile de acordare a acestora vor fi stabilite prin ordin al ANPF/ hotărâre de guvern.

Art. 44

- (1) Adăposturile private și cele în parteneriat public-privat pot fi înființate numai de către furnizorii de servicii sociale, acreditați în condițiile legii.
- (2) Autoritățile locale vor oferi sprijin în vederea înființării acestor adăposturi, inclusiv prin punerea la dispoziție gratuit a unor spații și scutirea de impozitele percepute la nivel local, în condițiile legii.
- (3) În cazul acordării de subvenții adăposturilor private sau în parteneriat public-privat, instituția care a acordat subvenția poate participa la administrarea unității în cauză sau monitorizează oportunitatea folosirii fondurilor alocate.

Art. 45

- (1) La primirea în adăpost victima este informată cu privire la drepturile sale și mecanismele juridice pentru apărarea acestora. Consultanța juridică este gratuită.
- (2) În cazul în care victima nu are calitatea de asigurat în cadrul sistemului național de asigurări de sănătate, cheltuielile aferente îngrijirilor medicale ale acesteia vor fi suportate din bugetul autorității locale.

Art. 46

- (1) Centrele de recuperare pentru victimele violenței în familie sunt unități de asistență socială cu sau fără personalitate juridică care asigură găzduirea, îngrijirea, precum și reabilitarea și reinserția socială a acestora.
- (2) Centrele de consiliere și reabilitare destinate agresorilor sunt unități de asistență socială cu sau fără personalitate juridică care asigură reabilitarea și reinserția socială a acestora, precum și consiliere și mediere familială.
- (3) Tratamentele psihiatrice, de dezalcoolizare și dezintoxicare acordate prin centrele de asistență destinate agresorilor se asigură în spitalele sau unitățile sanitare cu care s-au încheiat convenții.

Art. 47

- (1) Consilierea psihologică și alte forme de asistență a victimelor violenței în familie se asigură de către organismele publice și private autorizate.
- (2) Asistența medicală a victimelor violenței în familie care nu sunt asigurate în sistemul național de asigurări de sănătate se asigură din bugetul unităților teritoriale cu atribuții în combaterea violenței în familie.

Art. 48

Centrele de consiliere pentru victimele violenței în familie

Art. 49

Unitățile prevăzute la art. 42, 46 alin. (1) și (2) și art. 48 pot fi publice, private, în parteneriat public-privat și se înființează numai cu avizul agenției.

Art. 50

Voluntariatul în cadrul serviciilor pentru victimele violentei în familie.

Capitolul IX

Dispoziții tranzitorii și finale

Art. 51

Art. 149.1 din Codul penal se modifică precum urmează : **Prin «membru de familie »** se înțelege orice persoană membru al familiei biologice, legale sau de fapt sau care locuiește împreună cu făptuitorul și cu care a stabilit relații de încredere, îngrijire sau dependență.

Art. 52

Pe data intrării în vigoare a prezentei legi se abrogă :

- a) Legea nr. 217/2003 pentru prevenirea și combaterea violenței în familie, cu modificările ulterioare ;
- b) Orice alte dispoziții contrare.